APR 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

88-2066

No.

IN THE

SUPREME COURT OF THE UNITED STATES

June Term

JOSEPH URBANIK and
ESTELLE URBANIK, his wife

Petitioners

vs.

THE CITY OF BUFFALO
and
DAVID J. HENNEBERRY and
MARGARET HENNEBERRY, his wife

Respondents

Petition for the Writ of Certiorari to The Appellate Division, Supreme Court of New York 4th Judicial Department

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PETITION FOR WRIT OF CERTIORARI

RICHARD D. GRISANTI, ESQ.
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Buffalo, New York 14201
(716) 883-0400

QUESTION PRESENTED

Whether the New York State Court of Appeals wrongfully denied the Application for Permission To Appeal where there was a constitutional question involved under the 5th and 14th Amendments of the United States Constitution.

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No.

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Petitioners

vs.

THE CITY OF BUFFALO
and
DAVID J. HENNEBERRY and
MARGARET HENNEBERRY, his wife

Respondents

PETITION FOR WRIT OF CERTIORARI

The Petitioners herein respectfully pray that this Court grant a Petition for Writ of Certiorari seeking review of the Order of the United States Court of Appeals, entered in this action on February 24, 1989, and mailed on March 7, 1989, which denies an application for permission to appeal to said Court pursuant to their Rule 500.11 of the Rules of the Court of Appeals

in violation of the 5th and 14th Amendments of the United States Constitution.

OPINIONS BELOW

The New York Court of Appeals denied such application without opinion on February 21, 1989, (See Appendix A) and the Appellant Division of the Supreme Court, Fourth Judicial Department, affirmed the Order of the trial court at the close of Petitioners' case, dismissing the action herein (See Appendix B), unanimously and without opinion (See Appendix C).

JURISDICTION

This Court does have jurisdiction under the 5th and 14th Amendments of the United States Constitution.

The New York State Court of Appeals, by its decision of February 21, 1989, erroneously denied an application for leave to appeal, and by so doing denied Petitioners the right to "due process" and "equal protection of the law".

PROVISIONS OF LAW INVOLVED

United States Constitution - Amendment 5

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution - Amendment 14

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The within Action wascommenced by the service of the Summons and Complaint on or about January 28, 1983. The said Action sought judgment that a certain deed from the Respondent, CITY OF BUFFALO, to Respondents, HENNEBERRYS, dated December 8, 1982, be set aside, cancelled and declared void, pertaining to property located at 2355 South Park Avenue, Buffalo, New York, which deed was recorded in the Office of the Clerk of the County of Erie on December 15, 1982; said deed was given pursuant to a tax foreclosure sale known as In Rem 16. The property had been owned by the Plaintiffs since June 25, 1970; that this parcel was one of six (6) pieces of real estate that the Plaintiffs owned; that the taxes on the others were not the subject of any In Rem foreclosure sales at any time. The Plaintiffs are substantial and respected citizens in the community of Greater Buffalo; that a Motion was made by the Respondent, CITY OF BUFFALO, prior to trial to dis-

miss the Complaint herein and said Motion was denied by HON. FRANK R. BAYER, Justice of the Supreme Court of Erie County on August 3, 1983; that subsequently Appel- made a Motion before HON. VINCENT E. DOYLE, another Justice of the Supreme Court of Erie County, to serve an Amended Complaint and said Motion was granted over opposition by Order granted June 22, 1985; that the said Amended Complaint included the cause of action in the original Complaint but added two other causes of action, one for rent from the date of the foreclosure sale during the time the premises have been occupied by the Respondents, HENNEBERRYS; and the third for the reasonable value of equipment that remained on the premises after said foreclosure sale. The rental action was for $40,000.00 and the equipment $35,000.00.

A Third-Party Summons and Complaint had previously been served on the Respondent, CITY OF BUFFALO, by the Respondents, HENNEBERRYS; that Answers and Amended Answers were duly interposed by the said Respondents herein.

The In Rem proceedings involved taxes for the years 1978-1979, 1979-1980, and 1980-1981 and the current at that time; that the Petitioners contended in the Lower Court that they did not receive any of the notices from the City of Buffalo except the last notice that was sent out, which he received after the fact, to wit: after the foreclosure sale; that Petitioners testified that their mailing address was changed from the residence at 214 Lindsey Street, North Tonawanda, New York, 14120, to a P.O. Box during the period in question. Evidence was introduced at the trial consisting of a Summons from the City of Buffalo to the Petitioners, which was stamped paid May 22, 1978, which apparently pertained to the 1977-1978 taxes owing on 2355 South Park Avenue, Buffalo, New York (Appendix D); and then a receipt for payment of the same year, dated October 27, 1981 (Appendix E), which appears to be that the Petitioners paid twice for the tax year 1977-1978, which was included in In Rem 12. Further, on February 12, 1982, the 1981-1982 tax was paid (Appendix F) and was

offered in evidence; that, therefore, had all payments been applied first herein, the Petitioners' property would not have been included in the In Rem 16 proceeding. Throughout the trial, it was the contention of Petitioners that there was enough evidence to be presented to the jury wherein they could find that the presumption of regularity of the foreclosure proceedings had been rebutted. The Lower Courts, however, dismissed all of the causes of action herein at the close of Petitioners' case on Motion of the Respondents to dismiss the action herein, instead of submitting it to the jury.

An appeal was duly taken to the Appellate Division of the County of Erie, Fourth Department, State of New York, and that Court unanimously affirmed without opinion; that an application for leave to appeal was made to the Court of Appeals, State of New York, and said application was denied.

REASONS FOR GRANTING THE WRIT

THE LOWER COURT DENIED PETITIONERS DUE PROCESS IN DISMISSING THE ACTION HEREIN AND FAILING TO PRESENT THE CASE TO THE GRAND JURY.

The gravest error that the Lower Court committed was to grant a Motion pursuant to CPLR Rule 4401 made by the Respondents dismiss the first cause of action (Appendix G). The Court cited Real Property Tax Law, Section 1136(7) and stated that an In Rem foreclosure is presumptive evidence that the action and all proceedings therein and all proceedings prior thereto, including notices, etc., were regular and in accordance with all provisions of law relating thereto. The Court stated as follows:

"Now what that creates is a presumption of regularity, and it's a strong presumption as far as the law is concerned, and on this Record, this Court is unable to conclude as a matter of law that the Plaintiffs have produced sufficient evidence to overcome that

statutory presumption of regularity."

The presumption under Section 1136(7) is not a conclusive one but is rebutable, therefore, it is not up to the Court to conclude as a matter of law whether the Petitioners have produced sufficient evidence to overcome the statuatory presumption of regularity. It is a question of fact for the triers of the fact to determine whether enough evidence was presented by the Petitioners to overcome the presumption herein. On that basis, the Court was in error.

Counsel submits that even on Record as it is, in spite of the Court excluding much material and competent evidence, there is still much evidence that should have been submitted to the jury for their determination. With regards to the first cause of action, the witness, employee of the Respondent, CITY OF BUFFALO, Anna Marie Lofaso, testified in substance that various notices are sent out both prior to and during the In Rem proceeding, some which are not required by law in her lay opinion; and one or two of which are so

required; that she stated a large group of workers in her office take part in the preparation and mailing of such notices, except for the notice dated June 14, 1982, which she stated she addressed herself to the 1,779 property owners who were included in In Rem 16; that she testified that she could not specifically recall whether or not she addressed on to the Petitioners herein; further, she testified that if someone were to pay a tax such as Petitioners did on February 12, 1982, that that person would be instructed as to how many years were owing in back taxes. The question was raised then, Why was that payment by Estatelle Urbanik applied to current taxes instead of the oldest one, which would have excluded her property from the In Rem 16 proceeding? This, of course, would also apply to the Summons showing that she paid another tax, 1977-1978, two times, May 22, 1981. In Counsel's opinion, the Court committed error in not allowing him more latitude regarding such payments, there certainly was enough evidence that could have been presented to the jury for them to deter-

mine whether the City acted wrongfully or rightfully in not applying it to a later year so as to take said property out of the In Rem 16 proceeding.

Further, with respect to the first cause of action, there was the requirement under Section 1124 of the Real Property Tax Law that the Public Notice of Foreclosure be posted in "three other conspicuous places within such tax district". The Court stated that this was a question of law. On examination of Lawrence Wolfe, who was responsible for the posting, he testified that the said notices were posted in public buildings within a two block radius of each other. Counsel submits that when you are discussing the possible loss of important property rights, and you are talking about a community as large as the Buffalo area, posting three notices within a two block area is not a fair posting as is intended by the Statue. Besides that, Mr. Wolfe testified that he could not recall what documents he posted as far as In Rem 16 is concerned, at the time he was testifying, nor whether they were

posted at all, even though on cross-examination by Mr. Daumen, he tesified that when he signed the Affidavit it was in fact true. The thing that must be understood, however, is what is important is the witness' recollection at the time he is testifying and not at some prior time. At any rate, whether it was posted at all and whether it was posted in three conspicuous enough places, Counsel submits our question for the jury and not for the Court as a matter of law.

Further, there were not taxes owing so as to any of the other properties owned by the Petitioners so as to bring them into an In Rem proceeding. This circumstantially raises the question as to whether or not notices were sent and received by Petitioners; for if they were so received, why would they not have paid the taxes on this property also? Counsel submits that this is also evidence for the jury's consideration. Also, there is no testimony that Section 1124 of the Real Property Tax Law was complied within its provision that the last day for redemption must be a least ninety (90)

days from the date of the first publication of the notice, which, in this case, was June 16, 1982; the date for redemption on the Notice of Foreclosure was August 18, 1982, which is only a little over sixty (60) days, and not the ninety (90) days required by Section 1124. If there was a home rule ordinance shortening the time, then the question is whether it is valid.

OTHER ERRORS COMMITTED BY THE LOWER COURT

A) The Court at the behest of the Respondents compelled Petitioner, Estelle Urbanik, to bring voluminous records in the form of check stubs and individual and corporate tax returns and allowed two days of testimony on such exhibits. Once it was brought to the jury's attention that all of these records were going to be brought in, Counsel could not take a position that most of them were irrelevant and collateral, especially in view of the fact that the Court ordered these records. All during the cross-examination, the jury was misled into thinking that because of late filing of the taxes and so forth the Petitioners were

guilty of tax evasion. Indeed, such a question was asked by the attorney for the Respondent, HENNEBERRYS,

"Q. You understand it's a crime to deliberately understate your income?

A. Oh, yes."

And even though Counsel objected and was sustained, the inference to the jury was extremely real. Said cross and re-cross constantly gave the jury that inference. Further, Counsel for Respondents were allowed to give the jury the impression that the Petitioners were financially unable to pay their taxes because they were gamblers. All of this was high prejudical, especially when Counsel made an offer of proof to produce the CPA witness, Anthony Smollen, to explain that there was no tax evasion or anything improperly done with regards to those tax returns.

Then the Court stated it was not going to allow that witness to testify as an expert because the matter was collateral.

B) The Court refused to allow Counsel on

various occasions to ask whether the Petitioners received any notices, even though the law is clear that such receipt has a bearing on whether the notice was sent. Even though there is a presumption that if a notice or letter is mailed, it is presumed to have been received, it certainly would not foreclose Petitioners from testifying that they did not receive the notices. The Receipt plus all of the other evidence alluded to supra as well as the evidence that the Court would not allow, such as the difficulty the Petitioners had with their mail, the errant Christmas card, and the sheet from the Tonawanda Directory showing that there are at least two Lindsey Places, etc. Certainly, is proper evidence to be presented to the jury to determine whether the proceedure in In Rem 16 was properly formed.

C) The Court erred in not allowing an adjournment during the trial to allow sufficient time for a deposition to be taken of Daniel Moynihan, who for the first time, at the time of the trial, Counsel learned had Cancer and could not appear. He was the individual

who was responsible for actually putting the notices in the post office mail box, a very material witness herein.

D) The Court erred in its first ground for dismissing the third cause of action herein regarding the equipment by ruling that it was owned by the Corporation, which was not a Party, and not by the Petitioners, Counsel not only contends that the Petitioners were the sole principals of the Corporation, but the Petitioner, Joseph Urbanik, in this testimony stated that he pruchased originally the equipment individually. The witness, Izzo, testified that he sold it to Joseph Urbanik, even though the Corporation depreciated it on its tax returns. In any event, the Court could have, on its own Motion or given the opportunity of Counsel to so move, merely added the corporation as a Party hereto, pursuant to Rule 1003 CPLR, which read read as follows:

> "...Parties may be added or dropped by the court, on motion of any party or on its

own initiative, at any stage of the action and upon such terms as may be just."

E) There were approximately 115 objections, 90 to 100 of which were resulted against the Petitioners, which rulings were quickly made without the opportunity for argument. In this regard, Counsel submits that this was the most disjointed, most trying case he had experienced in his thirty years of trying both criminal and civil cases.

Counsel asks the question, Why did the Department of Urban Renewal of the City of Buffalo send notices by registered mail to the Petitioners when they wanted Petitioners removal from property he was renting from the City on Oak Street in Buffalo, and yet when it comes to important property rights of the individual, everything is done by ordinary mail, neither certified nor registered.

At any rate, the Lower Court should have allowed the trial to proceed and should have presented

the case to the impanelled jury and not have granted the Motions for Dismissal herein. HON. FRANK R. BAYGER denied a Motion for Summary Judgment in his order granted August 3, 1983. The Court on the trial herein should likewise have denied the Motions at the close of Petitioner's case.

The Court of Appeals of New York in the case of McCANN V SCADUTO (71 NY2d 164) struck down an In Rem Tax Sale in Nassau County due to lack of sufficient notice, ruling that the County regulations relative to In Rem sales did not provide sufficient notice, and, therefore, were unconstitutional and violated the 14th Amendment of the United States Constitution; that case was even stronger than ours in that it required at least one notice (regarding the notice to redeem) to be by certified mail; that in our case, the City of Buffalo holds it's In Rem Proceedings under the New York State Real Property Tax Law, Article 3, and Chapter 724 of the Laws of 1973; that none of those provisions require any notices to be served personally or by certified

mail; that relative to the right to redeem, as appears in the record, the State law requires 90 days, but the City of Buffalo has cut that down to 60 days; that we do not know by what authority it has done so; that, at any rate, Counsel asks this Court to strike the applicable provisions of statutes under which the City of Buffalo conducts it's In Rem Proceedings and, particularly, the notice provisions, as being unconstitutional.

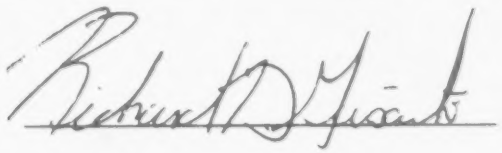
Opposing Counsel has contested that the McCANN V SCADUTO (71 NY2d 164) is distrinquishable in that it did not involve an In Rem foreclosure sale but a conveyance to the holder of a tax lien; he further has contended dthat the Petitioners admitted to receiving actual notice; he further endeavors to differentiate the case on the basis that the within action was under the New York State Real Property Tax Law, whereas the McCANN V SCADUTO case was under the Nassau County Administrative Code; first, what does it matter whether a person lost his property through a violation of due process and lack of notice either in an In Rem

foreclosure sale or a tax lien; secondly, the only notice that Petitioners admitted receiving was the last one, and that was after the forclosure sale had already taken place; and, lastly, what difference does it make whether the forclosure sale was under New York State law or County law if Petitioners' rights were violated under the due process law clause and under the equal protection clause as far as the lack of notice is concerned.

CONCLUSION

Petitioner respectfully submits that this is a case that is proper for review by Certiorari to the Supreme Court of the United States and they pray that the Petition for Writ of Certiorari be granted.

Respectfully submitted,



RICHARD D. GRISANTI
Attorney for Petitioners
Office & P.O. Address
577 Niagara Street
Buffalo, New York 14201
(716) 883-0400

PROOF OF SERVICE

RICHARD D. GRISANTI, ESQ., deposes and states that pursuant to Rule 28.3 of this Court he served this Corrected Petition for Writ of Certiorari on Defendant-Respondent by enclosing three copies of each thereof in an envelope, certified mail, return receipt requested, addressed to:

HON. SAMUEL F. HOUSTON
Corporation Counsel
Attorney for Respondent,
THE CITY OF BUFFALO
Office & P.O. Address
1100 City Hall
Buffalo, New York 14202
(716) 851-4343

DIFILIPPO, BENNETT & DAUMAN
Attorneys for Respondent,
HENNEBERRYS
Office & P.O. Address
681 Main Street
East Aurora, New York 14052
(716) 652-9560

and depositing same in the United States mails at Buffalo, New York, on the day of June, 1989.

RICHARD D. GRISANTI

APPENDIX A

STATE OF NEW YORK,

Court of Appeals

At a session of the Court,
held at Court of Appeals
Hall in the City of Albany
on the twenty-first
day of February
A.D. 1989

PRESENT, HON. SOL WACHTLER, Chief Judge, presiding

4-10 Mo. No. 1378

Joseph Urbanik, et al.,

Appellants,

v.

The City of Buffalo, et al.,

Defendants.

A motion for leave to appeal to the Court of Appeals in the above cause having heretobefore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

s/DONALD M. SHERAW

Donald M. Sheraw

Clerk of the Court

4-10 Mo. No. 1378 Motion for leave to appeal

Joseph Urbanik, et al. denied.

Appellants,

v.

The City of Buffalo, et al.,

Respondents.

DECISION COURT OF APPEALS

FEB 21 1989

APPENDIX B

Form 3. DAILY RECORD CORP.

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

826

PRESENT: DILLON, P.J., DOERR, GREEN, PINE, LAWTON,JJ.

Joseph Urbanik and Estelle Urbanik, his wife, Appellants,

v

City of Buffalo and David J. Henneberry and Margaret Henneberry, his wife, Respondents.

The above named Joseph Urbanik and Estelle Urbanik having appealed to this Court from judgments of the Surpeme Court, each entered in the Erie County Clerk's office on March 25, 1987 and said appeal having been argued by Richard Grisanti of cousel for appellants, Michael Dauman of counsel for respondents Henneberry, and Michael Hughes of counsel for respondent City of Buffalo, and due deliberation having been

had thereon,

It is hereby ORDERED, That the judgments so appealed from be and the same hereby are unanimously affirmed without costs.

Entered: September 27, 1988

CARMEN S. LEONE, Clerk

SUPREME COURT)

APPELLATE DIVISION,)

Fourth Judicial Department,)

Clerk's Office, Rochester, N.Y.)

I, CARMEN S. LEONE, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.

(SEAL WAS AFFIXED HERE)

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this SEP 27 1988

s/CARMEN S. LEONE

Clerk

APPENDIX C

826. (Erie Co.) -- Joseph Urbanik and Estelle Urbanik, his wife, Appellants, v City of Buffalo and David J. Henneberry and Margaret Henneberry, his wife, Respondents. -- Judgments unanimously affirmed without costs. (Appeal from Judgment of Surpeme Court, Erie County, Flaherty, J. - Void Tax Sale.)

APPENDIX D

We were unable to located this Exhibit at the present time. However, it will be available in the very near future.

APPENDIX E

PLF Exh. 15 Identification

PLF Exh. 15 Evidence

FEB 26, 1987

Marilyn L. Shimskey

Supreme Court Reporter

C I T Y O F B U F F A L O

NEW YORK

DEPARTMENT OF ASSESSMENT

JOSEPH T. CORDARO, IAO
COMMISSIONER

101 City Hall
Buffalo, N. Y. 14202

RE: Tax Foreclosure Auction - In Rem 12

You are the presumptive owner of real property in the City of Buffalo, New York on which City Taxes and/or Sewer Rents are due and unpaid for two (2) or more years.

The City of Buffalo has scheduled a tax foreclosure auction to be held on October 28, 29 and 30, 1981 at 9:30 a.m. in the Common Council Chambers, City Hall, Buffalo, New York.

If you desire to keep the property listed below from foreclosure, the following years of taxes must be paid (penalties not included). Payments must be made by a certified check, money order, bank draft or cash. Contact this office for a tax bill.

Premises: 2355 So. Park 13-3

Years to be paid:

1974-75		+ Interest
1975-76	807.24	+ Interest
1976-77	1724.80	+ Interest
1977-78	1724.80	+ Interest
$		

Department of Assessment
Tax Division
120 City Hall
855-5733

Called 10/27/81-

GENERAL CITY TAX -

FEET FRONT	FEET DEEP	LINE	STREET NO.	NAME OF STREET
117.18	120		2355	South Park

YEAR	BILL NUMBER	AMOUNT		INTER
		Dollars	Cents	Dollars
19 78-77	10714000	1724	80	707
19				
19				
19				
TOTAL				

MAKE ALL CHECKS PAYABLE TO TREASURER OF THE

DUPLICATE

DO NOT DETACH

(One-Half of Exhibit)

ARREARS	District	Part
	13	3

	SIDE STREET	DISTANCE FROM WHAT STREET		
		Feet	Course	Street
	W.	ho.	cov	Leland Dr.

EST	TOTAL AMOUNT		INTEREST FIGURED TO
Cents	Dollars	Cents	OCT 31 1981
17	2431	97	
			Part
CITY OF BUFFALO			In Rem 12 Ser 2075

RECEIPT NO.	DATE	PAYMENTS RECEIVED
7415	102781	2,431.97 15

(Second Half of Exhibit)

MARINE MIDLAND BANK, N.A.

NO. 6161960

Estelle Urbanik	10/27/81	10-2
REMITTER	DATE OF ISSUE	220

PAY $4,000.00

$4,000dol's00cts.

TO (

THE **City of Buffalo**

ORDER

OF

(

OFFICIAL CHECK

COPY-NOT NEGOTIABLE

AUTHORIZED SIGNATURE

A52A

CITY OF BUFF

DO NOT DETACH

REDEMPTION FROM

FEET FRONT	FEET DEEP	LINE	NAME OF STREET
117.18	120		2355 So. Park

SOLD TO

CITY O

YEAR OF SALE	NUMBER OF CERTIFICATE	FOR WHAT SOLD		AMOUNT OF SALE Dollar	Cents
19 76	10714000	Unpaid	1975	807	24
19 77	"	do	1976	1724	80
19		do	19		
19		do	19		
19		do	19		
19		do	19		
19		do	19		
19		do	19		
				2532	04

IF PAID ON

MAKE CHECKS PAYABLE TO TREASURER OF THE CITY O

RECEIVED OF

WHERE SHALL RECEIPT BE SENT?

NAME

ADDRESS

(One-Half of Exhibit)

ALO, N.Y.

C I T Y T A X S A L E S

13 3 clu

	SIDE STREET	DISTANCE FROM WHAT STREET		
		FEET	COURSE	STREET
	W	No.	cov	Leland Dr.

F BUFFALO

INTEREST		EXPENSES		TOTAL AMOUNT	
Dollars	Cents	Dollars	Cents	Dollars	Cents
524	71			1331	95
914	14			2638	94
1438	85			3970	89

(5) Discrimination against women in the selection of grand jury forepersons constitutes a constitutional violation.

(6) Denial of Chappee's motion for a severance constituted a prejudicial abuse of discretion.

Fuller claims:

(1) The consent to search the trunk, sought during custodial interrogation, was invalid under the state and federal constitutions because no *Miranda* warnings or other advisement of the right to counsel and the consequences of the consent were given.

(2) The conduct of the hearing on the motion to suppress was prejudicially erroneous, and a remand for a new hearing on the motion is required.

(3) The State's withdrawal of the plea bargain violated New Jersey law and policy; the precedent will cause plea negotiations to become unworkable.

A. Informal plea bargains are enforced on several different theories.

1. Introduction: the importance of the plea bargain.

2. Federal courts will enforce a plea bargain in the case of a federal constitutional infraction.

3. Plea bargains must be enforced in cases of partial performance or detrimental reliance.

4. Federal courts enforce plea bargains under their supervisory powers.

5. State courts use their supervisory powers to enforce informal plea bargains and other agreements.

B. The New Jersey Constitution, rules, and case law all require that the State be held to a high standard of conduct.

1. The New Jersey Constitution provides greater protection to the individual than does the federal constitution.

2. The New Jersey plea bargain model.

C. The State's actions violate the New Jersey rules aimed at fairness and judicial efficiency.

1. The State promised to leave the plea offer open.

2. The State has no 'plausible reason' for its change of position.

3. Failure to place the plea on the record does not void the State's commitment.

4. To allow arbitrary withdrawal of a plea offer legitimizes abuse of the plea bargain model.

D. Inability to rely on the State makes the plea bargain model unworkable.

1. Defense counsel will be forced to weigh the wrong factors.

2. Reliance is necessary for the plea bargain model to work.

(4) The arbitrary denial of counsel of choice violated appellants' Sixth Amendment rights.

(5) Discrimination against women in the selection of grand jury forepersons constitutes a constitutional violation.

(6) The court's reasons for Fuller's sentence were unsupported by the record; the prosecutor's conduct violated the plea agreement; and the sentence was excessive.

A. The court's reasons for imposing the sentence are unsupported by the record.

1. Fuller, a courier, was erroneously sentenced as a principal.

a. Substantive error.

b. Procedural error.

2. The court's evaluation of aggravating and mitigating factors is unsupported by the record.

a. Mitigating factors.

1. Fuller's conduct neither caused nor threatened serious harm.

2. Fuller did not contemplate that his conduct would cause harm.

3. Community service.

4. Circumstances unlikely to recur and unlikely to commit another crime.

5. Likely to respond to probationary treatment.

6. Excessive hardship.

7. Willingness to cooperate with law enforcement authorities.

8. Miscellaneous mitigating factors.

b. Aggravating factors.

1. The nature of the offense.

2. Whether the defendant will commit

another offense.

3. Organized criminal activity.

4. Deterrence.

B. This court should modify Fuller's sentence.

C. The prosecutor's conduct violated the terms of the plea agreement.

The circumstances giving rise to the arrest and search and seizure, developed at the hearing on the motion to suppress, are not complicated and indeed are quite typical. At approximately 4:30 a.m. on November 14, 1980 State Troopers Raymond Chintal and Guy Madison were on patrol on the New Jersey Turnpike. As they were pulling out of a service area, they observed a Pontiac automobile with Florida license plates and a radar detection device on the front dashboard speeding by. The troopers followed the car, clocking it at 65 miles per hour. The officers pulled the car over and then exited their vehicle with Chintal approaching the driver's side of the Pontiac and Madison approaching the passenger side. At Chintal's request the driver, Chappee, produced his drivers license but he was unable to show a registration for the vehicle. Chappee then woke Fuller, who had been sleeping in the back seat. Fuller leaned over the front seat and unsuccessfully searched in the glove compartment for the registration.

Madison then motioned for Fuller to roll down the passenger side window and as he did so Madison smelled marijuana smoke and signalled to Chintal. While Fuller was searching for the registration, Chintal noticed that Chappee seemed "very nervous" with his hand movements being "very flighty." Consequently Chintal requested defendants to exit the vehicle. After he patted Chappee down and directed him to the rear of the car, Chintal shined his flashlight into the interior of the car and ob-

served a partially burnt marijuana cigarette on the mat in front of the driver's seat.

Chintal then looked under the driver's seat for weapons and approached Chappee with the "roach." Though he cautioned Chappee that he need not answer, Chintal asked him if the car contained any more marijuana. At about the same time, Fuller was at the rear of the car searching for the registration in an attache case he had carried from the rear seat. Fuller appeared to the officers as "cocky" or arrogant and he was using profanity. While Fuller continued to search for the registration, Chappee paced on the highway shoulder until the officers requested him to sit down.

Inasmuch as Fuller's search had not yielded the registration, Chintal asked him if it could be in the trunk. Fuller responded that it might be and, according to Madison, stated he had nothing to hide and would find the registration. Officer Madison retrieved the car keys from the ignition, and as they were handed to Fuller, Chintal advised him that under *State v. Johnson*[2] he could refuse consent to open the trunk. Fuller, however, consented and when he opened the trunk, Chintal observed several garment bags, a tool box and a canvas bag. According to Chintal, Fuller began to search among the boxes for the registration and as he opened a Hamilton Beach blender box, Chintal saw the corner of a clear plastic bag which he believed contained marijuana. At this point Chintal left the suspects and returned to the patrol car to get a consent to search form. Madison testified that as Fuller searched among the boxes his hand somehow caught the bag Chintal had observed and the bag, which did, in fact, contain marijuana, "popped up, maybe a foot in the air, and it landed back in the trunk and I just picked it up."

Madison testified, however, that Chintal was present during this incident and left to get the consent form only

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[2] 68 *N.J.* 349 (1975).

after the bag had popped out of the box. Madison stated he later learned from Chintal that Chintal had observed a different plastic bag and had left to retrieve a consent form. In any event, Madison testified that Fuller was "startled" at the sight of the exposed marijuana and stated that friends who had borrowed the car in Florida must have left it in the trunk. Fuller then closed the trunk, handed the keys to Chappee, yelled that they should get out, and the two men ran to the right side of the car. According to Madison, as Fuller slid behind the steering wheel he jumped on top of him. As Chappee was trying to get the keys in the ignition, Officer Chintal arrived and pulled Chappee from the vehicle. After the two tumbled down an embankment, Chintal was able to subdue and handcuff Chappee. Officer Madison restrained and handcuffed Fuller. The suspects were arrested and put in the patrol car.

According to Fuller, he and Chappee had been driving for 20 hours from Florida. He had taken a Quaalude 30-40 minutes before he had been stopped and had smoked a half joint of marijuana 10 minutes after taking the Quaalude. After being asked to exit the car he produced what he thought was the registration but which Madison said was only a "dealers tag." Fuller admitted that Chintal, in asking if the car contained other contraband or if the registration could be in the trunk, informed him of his right to consent to a search or refuse consent, and to stop the search at any time. Fuller also testified that Chintal informed him that should the search disclose contraband he and Chappee would be arrested. However, according to Fuller, Madison stated that regardless of whether Fuller consented he would open the trunk. Fuller testified that he did not consent to the search and it was Madison who opened the trunk. According to Fuller, after the trunk was opened he began to move boxes around in the trunk in an effort to show the police there was no contraband in the car, and to avert their attention from a box which

contained marijuana. However, Madison began to examine the contents of the trunk, and upon opening one box stated "what's this"? at which time Chintal left for the police car. Fuller stated that Madison then punched his fist through another box and started coming up with a bag of cocaine, and it was then that he and Chappee attempted to escape.

After defendants were arrested they were taken to the State Police barracks in New Brunswick and their automobile was impounded. Defendants were given *Miranda* warnings and Fuller signed a written consent form to search his car, although he sought to invalidate the document by printing a notation indicating the trunk had already been searched. As a result of statements made by Fuller after he received his rights indicating his car contained cocaine, marijuana and a can of mace, Chintal and another trooper obtained a search warrant from Judge Hamlin. In the subsequent search of the trunk of the vehicle, numerous clear plastic bags containing cocaine and approximately one pound of marijuana were found. In the interior of the vehicle the officers found eight suspected Quaaludes, smaller quantities of marijuana and a can of mace. Eventually it was determined that in excess of five pounds of cocaine was recovered.

In his written opinion denying defendants' motion to suppress, Judge Hamlin found that the officers had legal grounds for originally stopping the Fuller vehicle, the roach retrieved by Chintal from the front seat was in plain view, defendants received adequate warnings under *State v. Johnson* and Fuller consented to a search of the trunk. The judge further concluded that the marijuana the officer observed in the trunk was also in plain view after the trunk was opened and, finally, the judge held that the officers had probable cause to search the entire vehicle while detaining defendants on the turnpike regardless of whether valid consent to search was given.

Extensive hearings were also held on defendants' motion to dismiss the indictment based on the exclusion of women from the position of grand jury foreperson. At these hearings evidence was developed showing how forepersons are selected and describing their functions. The order of March 8, 1983 denying the motion to dismiss was the product of these hearings.

We deal initially with the court's refusal to enforce the plea agreement, and reject defendants' contentions in this regard. In *State v. Antieri*, 186 *N.J. Super.* 20, 25 (App. Div. 1982), certif. den. 91 *N.J.* 546 (1982), we would not accept an argument that the trial court erred in not specifically enforcing a plea agreement which was offered and accepted, but later withdrawn by the State. The defendant's position in *Antieri* was stronger than defendants' positions here as there the defendant entered his plea of guilty before the prosecutor withdrew from the agreement. *Id.* at 23. Here the pleas of guilty were not entered on the record before the State withdrew its offer. Finally, we point out that defendants were not prejudiced in asserting any defense by the State's change in position.

In any event the plea agreement could not be effective unless approved by the judge. Thus the most relief defendants could obtain on this point would be a remand to ascertain if the judge would accept the agreement. We, of course, may exercise original jurisdiction to complete the determination of the matter. *R.* 2:10-5. We do not hesitate to say that even if we found that the prosecutor should not have been allowed to withdraw from the agreement instead of remanding to the trial judge to determine if he would accept it, we would exercise original jurisdiction and reject it. We are, after all, in a position as favorable as the trial judge to pass on the reasonableness of the agreement, as all the facts of the case are before us. It is obvious that for the gravity of the offense involving the transportation of massive amounts of cocaine, the offer was far too lenient. Indeed, we are shocked that

it could have even been contemplated that defendants could have been given such short sentences for their grave offense.

Defendants' argument for relief based on underrepresentation of women as Middlesex County grand jury forepersons is predicated on the fact that while the 52 grand juries selected in Middlesex County between January 1, 1976 and April 29, 1981 were approximately equally divided between men and women, 49 men and three women were selected as forepersons. In passing on this contention we note that clearly there was no intentional discrimination against women. Judge John C. Demos, now deceased but Middlesex County Assignment Judge during the time the 52 grand juries were selected, testified that he had never used race or sex to exclude people from the position of foreperson. Rather, he made his selection from the grand jurors on the basis of his observations of them and his review of questionnaires indicating their sex, age, address and occupation. Although there were no specific criteria for selection of forepersons, Judge Demos looked for people whom he believed would have skill in communication and who may have administrative or supervisory experience. Judge Demos also made it his practice to select a woman as either foreperson or deputy foreperson and to have a male or female black person in one of those positions.

In passing on defendants' contentions with respect to forepersons, we recognize that in a purely statistical sense, women have been underrepresented in that capacity. We do, however, point out, although we do not regard this circumstance as controlling, that we are unable to see the slightest prejudice to defendants by reason of this underrepresentation as there is absolutely no basis in the record to conclude that defendants, who were caught with over five pounds of cocaine, were more likely to be indicted by a grand jury with a male rather than a female foreperson. In any event, the record fully supports the judge's con-

clusion that the duties of the foreperson are ministerial. *See R.* 3:6-4. In view of all the circumstances, we conclude that defendants' contentions that their rights to due process and to an impartial grand jury have been violated because of the alleged discrimination in selection of forepersons in Middlesex County is without merit. *See Hobby v. United States*, 468 *U.S.* ___, ___, 104 *S. Ct.* ___, ___, 82 *L.Ed.*2d 260, 265-266 (1984).

Defendants assert that when they were detained and questioned on the turnpike they were in custody and thus they should have been given the warnings required by *Miranda v. Arizona*, 384 *U.S.* 436, 86 *S. Ct.* 1602, 16 *L.Ed.*2d 694 (1966), before they were requested to consent to open the trunk. In their view the police action of confronting them with the marijuana roach was likely to elicit an incriminating response and was the functional equivalent of express questioning. We disagree. As was stated in *Hubbard v. Jeffes*, 653 *F.*2d 99, 101-102 (3 Cir. 1981):

> The absence of *Miranda* warnings does not vitiate consent to a seizure of personal property, because the *Miranda* protections are addressed to constitutional rights that are distinct from Fourth Amendment rights. Solicitude for individual privacy is the central thrust of the Fourth Amendment. *Katz v. United States*, 389 *U.S.* 347, 88 *S. Ct.* 507, 19 *L.Ed.*2d 576 (1967). Privacy rights must be balanced, however, against the interest of the community 'in encouraging consent [to a search], for the resulting search may yield necessary evidence of the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongfully charged with a criminal offense.' *Schneckloth, supra*, 412 *U.S.* at 243, 93 *S. Ct.* at 2056. Inasmuch as the integrity of the fact-finding process may be enhanced by admitting evidence recovered

> from a search or seizure, the Supreme Court has not required a stringent standard for measuring voluntariness in the Fourth Amendment context. As the Court noted in *Schneckloth*, in refusing to impose the 'knowing and intelligent waiver' standard, 'almost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial.' 412 *U.S.* at 237, 93 *S. Ct.* at 2052. The *Miranda* rights implicate the reliability of the truth determining process, because they apply in an inherently coercive situation and they protect the right to counsel and the privilege against self-incrimination. Knowledge of the right to be assisted by counsel and to remain silent, however, has little bearing on the voluntariness of a consent to a search.

We further point out that in *State v. DeLorenzo*, ___ *N.J. Super.* ___, A-4656-84T4, decided May 5, 1986, we held that *Miranda* warnings need not be given in a drunk driving situation before the defendant is asked to give a breath sample as the taking of the sample is nontestimonial. *See also Cody v. Salem*, 755 *F.*2d 1323, 1330 (8 Cir. 1985), *cert.* den. ___ *U.S.* ___, 106 *S. Ct.* 104, 88 *L.Ed.*2d 84 (1985); *United States v. Ritter*, 752 F.2d 435, 438-439 (9 Cir. 1985).

There was no error in the court's discretionary decision under *R.* 1:21-2 to deny admission to out-of-state counsel *pro hac vice*. While obviously the Sixth Amendment guarantees criminal defendants the right to assistance of counsel, it does not assure them the absolute right to the counsel of their choice. *Davis v. Stamler*, 650 *F.*2d 477, 479 (3 Cir. 1981). So long as the bar of this State is able to provide effective counsel, there is no constitutional right to select an attorney who is not a member of the New Jersey bar. *State v. Kavanaugh*, 52 *N.J.* 7, 18 (1968), *cert.*

den. *sub nom. Matzner v. New Jersey*, 393 *U.S.* 924, 89 *S. Ct.* 254, 21 *L.Ed.*2d 259 (1968). Furthermore, it has been held that:

> [the risk that] the presence of out-of-state counsel might hinder the orderly processing of the case is a sufficient countervailing state interest to justify the court's decision not to grant counsel of defendant's choice.

Williams v. Nix, 751 *F.*2d 956 (8 Cir. 1985), *cert.* den. ___ *U.S.* ___, 105 *S. Ct.* 2681, 86 *L.Ed.*2d 699 (1985). Here Chappee sought admission for John Van Ness, a Colorado attorney, and Fuller sought admission for Keith Stroup, a member of the District of Columbia bar, and a Mr. Pritzler, a member of the Illinois bar. The trial judge noted the difficulties in scheduling criminal cases when all attorneys are members of the New Jersey bar, and believed the problem would be exacerbated by admitting counsel in this case. The court further believed that the issues presented in the case could be ably handled by local counsel. Inasmuch as the proposed attorneys were from varied and distant geographic locations, the judge certainly did not abuse his discretion in denying defendants' motions.

We also point out the following. We have given this case an intensive review. While we do not suggest that the absence of discernable prejudice from denial of defendants' motions for admission of counsel *pro hac vice* in itself precludes defendants from obtaining relief by reason of the denial, we nevertheless think it appropriate to state that from our study of the record, the briefs on appeal and observation of defendants' attorneys at oral argument, it is clear defendants have received extremely competent representation both in the trial court and here. Indeed we are satisfied that beyond any doubt even if defendants had been represented by the attorneys denied admission they could not have received more competent

representation or a better result. We point out that defendants almost asked to be arrested. They were speeding on the turnpike in the early morning hours with marijuana in plain view. Further, they did not even have proper papers for the car. The case against them was overwhelming and their guilt clear beyond doubt. Yet skilled counsel has raised every conceivable defense on their behalf and has turned what should have been a routine case into a massive and protracted struggle. The trial judge's anticipation that New Jersey counsel would ably conduct the defense has been vindicated.

We have carefully considered all other issues raised and have determined they are clearly without merit. *R.* 2:11-3(e)(2). We note that at oral argument Chappee's attorney, who represented he had his client's consent to do so, withdrew point VI of his brief relating to denial of the severance motion.

Affirmed as to both defendants.

I hereby certify that the foregoing is true copy of the original on file in my office.

Elizabeth McLaughlin
Clerk

APPENDIX H

SUPERIOR COURT OF NEW JERSEY
CRIMINAL DIVISION: MIDDLESEX COUNTY

INDICTMENT NO. 938-80

STATE OF NEW JERSEY,

Complainant,

vs.

DOUGLAS DAVID CHAPPEE,
GLEN STEPHEN FULLER,

Defendants.

STENOGRAPHIC TRANSCRIPT
OF
MOTION

New Brunswick, New Jersey
July 2, 1981

BEFORE:

THE HONORABLE C. JUDSON HAMLIN, J.S.C.

APPEARANCES:

FRANK GRAVES, ESQ.,
Assistant Prosecutor for the State.

MESSRS. PODVEY & SACHS,
BY: J. BARRY COCOZIELLO, ESQ.,
Attorneys for Defendant Chappee.

DAYE F. FENTON,
C.S.R.
Official Court Reporter

[2]—MR. COCOZIELLO: Barry Cocoziello for Douglas Chappee.

THE COURT: The record will reflect we're here in the matter of State versus Chappee and Fuller.

The record will reflect a number of motions were filed in this matter, at some prior time, that were adjourned, they were scheduled for the last motion day. They were adjourned again, there was then a, obviously, some sort of misunderstanding between the Court and Counsel for the Defendant and I do not mean that the fault could not be the Court's, very well may be, in which case I indicated that all these motions would be disposed of today.

Counsel, yesterday, came to me and indicated that he had only received short one day notice, I guess about Tuesday or Wednesday, and indicated that he couldn't get everybody together, consistent with, to proceed with the matters. I expressed some surprise, indicating that I thought at last time when I adjourned it that it was understood that today would the disposition day, indicates to me that the [3] information from my secretary may have been otherwise.

Be that as it may, I intend to dispose of as much as I can today and then we'll play it by ear from there.

Now, then, first of all, counsel, you are attorney for Chappee.

MR. COCOZIELLO: That's correct, your Honor.

THE COURT: And the attorney for Fuller is Ann Nelson.

MR. COCOZIELLO: From Pellettieri, Rabstein. Fuller is represented by the firm of Pellettieri, Rabstein & Altman.

THE COURT: They are unable to appear today? What happened?

MR. COCOZIELLO: I don't know that they were given notification. I received a call from the Court on Tuesday morning, advising me that motions would be heard today. I don't know whether they received a call from the Court or not.

Your Honor, perhaps I could give some background to this and I'd like to move for an application to the Court.

[4]—Preliminarily, I request that the motions in this matter, there are seven motions pending, three of which I consider procedural and not requiring any type of hearing. The other four requesting hearings. I'm prepared to argue three of the motions.

THE COURT: What three are you prepared to argue? Let's do that.

MR. COCOZIELLO: I'm prepared to argue the motion to sever count five. I'm prepared to argue the motion to dismiss counts one, two and three, as multiplicity and I'm prepared to argue the motion to admit John Van Ness Pro hac vice for the Defendant, Chappee.

The other four motions request hearings and quite frankly I consider them substantive, and I think all counsel should be here, as well as the clients who have requested being here, since they do face quite severe sanctions in this matter and they have requested that they, that they attend on substantive motions.

THE COURT: All right. Well, I'll tell you what, Mr. Cocoziello, I have reviewed all motions at some length and what is patently clear is that your clients have undertaken to [5] expend a great deal of efforts and money to contest the action, which is fine for lawyers, God bless 'em, and I would assume, since in view of the time and money that have already been spent, that obviously every action taken by the Court here will be appealed, quite appropriately, quite rightly. Therefore, every determination that this Court makes must necessarily be made upon sober reflec-

tion, good basis and a good record, cause just as it is to your advantage to call for as many decisions and determinations as may be necessary in the course of an action, so it is the Court's responsibility to render a judgment consistent with the law, which happily will be affirmed, at some later date.

The only motion under those circumstances, while I have made some preliminary review and frankly I've made some preliminary decision on just about all of the motions that you've made, which of course I don't mean to say that I've predecided them, I have not, I have reviewed your papers and made some preliminary decisions and I wait, with great anticipation, the oral argument that both sides will afford me, [6] but I do want to dispose of the matter and I do want to dispose of the matter before I leave, and I was originally going to proceed today and dispose of motions, whether you were ready to argue them or not. That does not strike me as a particularly wise idea, so what I propose to do, Counsel, is have my secretary notify Pellettieri and Rabstein and next Friday is not a motion day, preemptorily, without further adjournment, with the exception of one motion which I will hear you, I will hear your pro hac motion today, with the exception of all other motions or rather with that exception, all other motions will be returnable on Friday, at nine a.m., to be specially argued in this matter, at which time I will be prepared to dispose of all of them and you will have, she will advise counsel. I would also ask you to consult with counsel.

Now, sir, your one motion I will hear from you today is the application to admit Mr. -- what's his name?

MR. COCOZIELLO: John Van Ness, your Honor.

THE COURT: Counsel, as you are aware, I [7] have your moving papers and there's notice of motion, there is the affidavit, there is the authority of the client and there is the certification of good standing by the bar of Colorado as to Mr. Van Ness. However, this is under 121-2, a motion

addressed to the discretion of the Court, and Mr. Cocoziello, I wonder if you can tell me what it is in this case that's a Turnpike search, which we see thousands, the only difference being is they have a fair amount of cocaine in the back of the trunk, other than the amount of what's in the back of the trunk, what is it in this case that is so specialized and so difficult that within the length and breath of the State of New Jersey, competent counsel, such as yourself and you're extremely competent counsel, cannot be found.

MR. COCOZIELLO: Judge, preliminarily, let me state that it's my opinion and I'd argue to the Court that it's found law that while in civil cases the Court in this state may exercise broad discretion in admitting counsel, pro hac vice, to argue matters, that that discretion is somewhat circumscribed in criminal matters.

[8]—Judge, the severity of the matters, the fact that the Defendant faces the sanctions that he might face, in this case, life in jail, should afford to that Defendant almost an unfeddered right to be represented by counsel of his choice, if that counsel is competent counsel.

This case, while it is a Turnpike search, also involves significant issues of both constitutional standing, as well as a complex motion involving the, the classification of cocaine within our statutes. It's complicated in that it calls for expert testimony by pharmacologists, it's a technical area, Mr. Van Ness had been involved in these areas before and has dealt with such issues before, as has Mr. Stroup.

THE COURT: I apologize for interrupting you, but a thought occurs to me, so to the extent that the classification of cocaine within the controlled dangerous substance law, you assert is unreasonable, arbitrary and capricious --

MR. COCOZIELLO: Misclassified, yes.

THE COURT: But still that's the --

MR. COCOZIELLO: Underlying opinion, yes.

[9]—THE COURT: Therefore challenges the constitutionality of such classification for penal purposes, correct?

MR. COCOZIELLO: Correct, your Honor.

THE COURT: May you challenge a constitutionality of state statute, without giving notice to the attorney general in this state?

MR. COCOZIELLO: Frankly, Judge, I had not --

THE COURT: The answer to that is no.

MR. COCOZIELLO: They will be given notice today.

THE COURT: Well, you can't give them notice today and be in time for Friday.

MR. COCOZIELLO: Judge, I, notice will be given to them. If it's out of time and they object, the Court will of course dispose of that.

THE COURT: You can bet your booties the AG's going to object to that. All right.

MR. COCOZIELLO: Respectfully, your Honor, I think that there are, your Honor, as you have stated, have reviewed some of the motions to suppress, I again reiterate to the Court they are [10] of some complexity, although on first blush appears on just a routine quote, unquote, Turnpike search, I think that counsel should be admitted pro hac vice, especially since the client has expressed a strong desire that that be so.

THE COURT: All right. The matter before the Court calls for it, under Rule 121-2, to exercise its discretion to determine whether or not out of state counsel should be admitted pro hac, to appear on behalf of the defendant.

The law in this matter of course arises out of a number of cases, *State v. Cavanaugh*, a famed matter with F. Lee

Bailey, which followed up by in re Bailey, which is an interesting juxtaposition with Cavanaugh, but the prevailing law, as expressed in all of those cases indicate while the counsel in the criminal case, certainly to be accorded wide latitude, in selection of counsel with whom he is personally confident and at ease, it nonetheless must be considered in connection with the difficulty of the case, the expertise and specialty and the extent to which the Court may reasonably anticipate compliance with its orders and the operation of an orderly [11] and efficient motion and trial schedule.

In this matter, the Court finds that Mr. Chappee has indicated, by his written request, to be represented by Mr. Van Ness of Aspen, Colorado. Mr. Van Ness is an attorney of good standing in the State of Colorado, I so find, and he says, I have developed a specialization in the area of defense of drug-related offenses, as has numerous counsel in the State of New Jersey, and has attended lectures and conferences, as have several counsel in the State of New Jersey.

In regard to the motions which I have reviewed at length, I'm talking now about the motions to dismiss, the motions to sever, the motion which seeks to upset the indictment, based upon an alleged underrepresentation of women and I presume other minority groups, although the affidavits speak primarily in terms of women, as forepersons of a grand jury, they are indeed motions which have been the product of a lot of long thinking and extensions of logical premise, one may be not so logical premise, I suppose on a theory or redutio [12] ad absurdum, I don't know that, but I will say having practiced criminal law for the last several years of my professional life, having sat here and seen extremely able and extremely illustrious counsel, that there are more than adequate local counsel to meet both the needs and the imagination of the proposition set forth here. I take notice of the competency of counsel, New Jersey counsel who appears before me today,

in both his ability to relate and understand New Jersey propositions.

The Court, by the way, the record will reflect that I have consulted with the Assignment Judge in this matter and it is clear and I so find it's difficult enough to run a trial calendar and a motion calendar with counsel throughout the State, to get them here together on time, obviously if we involved out of state counsel from Colorado, who is on his feet today in Colorado and perhaps tomorrow in California, and the day after that in Florida, the opportunity to consult, meet with and to schedule becomes extremely difficult. I am not satisfied that the degree of difficulty with this case is such that necessarily requires [13] out of state counsel. I am satisfied there is more than adequate competent in-state counsel to meet the needs.

I find that the admission pro hoc of a Colorado attorney to appear would unnecessarily burden and unduly delay the disposition of motions, arguments and trials of the case and accordingly the motion to admit pro hoc is denied.

You'll submit an order, Mr. Graves.

MR. GRAVES: Thank you, your Honor.

THE COURT: Now, then, before we go further, there is also pending a motion on the grand jury makeup, and I suppose if we can use the language of sociologists, group dynamics and the rest, the Assignment Judge advised me that there was some sort of ex parte application that you had discussed with him. Is that correct, Mr. Graves?

MR. GRAVES: Your Honor, I had discussed an ex parte application with the Assignment Judge, based on information I had received from Mr. Noto, the head of our Grand Jury Section, and Grand Jurors had called him and indicating some concern that they had been contacted by [14] party or parties unknown requesting certain personal and background information. Since then Mr. Noto has indicated to me that he has some, some, at least one has

called him indicating that the person was contacting people for the firm of Podvey & Sachs and I find, to my utter amazement this morning, and I've been delivered some, some motion papers including a certification by a secretary for Podvey & Sachs, indicating she's been contacting grand jurors, spoken with them and has quoted responses.

My reading of Rule 1:16-1, absolutely prohibits such contact, except by order of the Assignment Judge, and on my, my ex parte application was to have been permission, for permission to contact the Grand Jurors ourselves, to find out how many have been contacted and what had been asked of them. Obviously, I would, I would indicate to the Court, that this latest package of motion papers and affidavits would obviate the necessity for my making that motion, but I would ask --

THE COURT: Counsel, are you contacting Grand Jurors without permission of the Assignment Judge?

[15]—MR. COCOZIELLO: Yes, Judge.

We have contacted formerly sitting forepersons of grand juries, by way of survey to determine whether or not, to determine, I should say, the race, sex and opinion as to what their function was in serving as foreperson of the grand jury.

THE COURT: What, by what right do you think you can do that without the permission of the Court?

MR. COCOZIELLO: I don't see anything that would prohibit my right to do that, your Honor.

THE COURT: You don't?

MR. COCOZIELLO: No, your Honor.

THE COURT: Very good.

You are hereby, I'm going to issue an order which will be in force from now until next Friday, which will bar, prohibit, direct, enjoin you and any representative on your

behalf, your firm or your client, from making any contact whatsoever with any grand juror for any purpose, until I have heard full argument on Friday morning, next, as to your right to do so.

I will expect from the Prosecutor a letter memorandum, I will expect a letter [16] memorandum from you as to why you think you can do it.

I will also ask all information that has been obtained from any grand juror by you, to be forwarded, with your letter, to me. I want to know what grand jurors you contacted, I want to know what questions you're asking and I want to know what answers you've got. From now until next Friday you don't talk to anybody. Understood?

MR. COCOZIELLO: Judge, does that include formerly sitting grand jurors or just present?

THE COURT: Formerly, formerly, present, everybody, formerly, present, everybody, zero, none.

MR. COCOZIELLO: Fine, your Honor.

I don't, I would object and just so the record is clear to the ex parte communication by counsel for the State to, to the Assignment Judge in this county. If they --

THE COURT: Who else would you take a problem to but the Assignment Judge?

MR. COCOZIELLO: No problem if they have a problem of taking it to an assignment judge, what I have a problem with is being ex parte. [17] If in fact they feel aggrieved by something I've done --

THE COURT: Apparently, the first information came to them, they didn't know who was calling, apparently only recently they've learned now we've resolved it. In any event, it's in the form of a temporary restraining order, until next Friday, until I can hear full argument on the matter.

MR. COCOZIELLO: Judge, I know your Honor has ruled on the pro hoc veche motion of John Van Ness. Your Honor incorporated in that a finding that Mr. Van Ness could not be present for scheduling conferences, et cetera. Just so the record -- I don't know frankly what that finding was based upon.

THE COURT: I'll tell you what that finding is on. The finding is based upon common knowledge that in order to come from Colorado to here or such other place, you got to get on airplanes, you have to compete with other demands on the schedule, you got a flying time arrangements, you have other arrangement, you have other demands, you have other courts which obviously Colorado is going [18] to take precedence over, and I don't think that it calls for any great expertise, either on myself, the Appellate Division, or even the Chief Justice of the State to understand it's harder to get a hold of a guy from Colorado, than it is from New Jersey. I have enough trouble fighting with Burlington County judges to get lawyers, I'm going to fight with Colorado guys to get lawyers?

That's the basis of the finding.

MR. COCOZIELLO: Thank you, your Honor.

THE COURT: You'll prepare the order.

(Whereupon, the matter was concluded.)

SUPERIOR COURT OF NEW JERSEY
CRIMINAL DIVISION, MIDDLESEX COUNTY

INDICTMENT NO. 938-80

STATE OF NEW JERSEY,
Complainant,

vs.

DOUGLAS DAVID CHAPPEE,
GLEN STEPHEN FULLER,
Defendants.

CERTIFICATE

I, DAYE F. FENTON, a Certified Shorthand Reporter of the State of New Jersey, do hereby certify the foregoing to be a true and accurate transcript of the proceedings as taken stenographically by and before me at the date, time and place aforementioned.

/s/ Daye F. Fenton
DAYE F. FENTON, C.S.R.
Official Court Reporter

APPENDIX I

SUPERIOR COURT OF NEW JERSEY
CRIMINAL DIVISION, MIDDLESEX COUNTY

Indictment No. 938-80

STATE OF NEW JERSEY,

Complainant,

vs.

DOUGLAS DAVID CHAPEE,
GLEN STEPHEN FULLER,

Defendants.

STENOGRAPHIC TRANSCRIPT
OF
MOTION

New Brunswick, New Jersey
July 9, 1981

BEFORE:

THE HONORABLE C. JUDSON HAMLIN, J.S.C.

APPEARANCES:

FRANK GRAVES, ESQ.,
Assistant Prosecutor for the State.

MESSRS. PODVEY & SACHS,
BY: J. BARRY COCOZIELLO, ESQ.,
Attorneys for Defendant Chappee.

MESSRS. PELLETTIERI, RABSTEIN & ALTMAN,
BY: RICHARD ALTMAN, ESQ.,
Attorneys for Defendant Fuller.

DAYE F. FENTON, C.S.R.
Official Court Reporter

[2]—THE COURT: Thc record will reflect we're here in the matter of State of New Jersey versus Douglas David Chappee, Glen Stephen Fuller. The record will reflect we're here without the presence of the Prosecutor. They were notified to be here at nine o'clock this morning by the Court, they were not here, we'll proceed in their absence.

The record will reflect that there are a number of motions that were filed some time ago in this matter, they were adjourned at various requests of the defendant, and then there was a mixup on notice and last Friday there was a motion made by the defendant, Chappee, to admit, pro hac, a member of the bar of Colorado, which was denied. At that time I was advised by Mr. Cocoziello that, I advised him in view of my vacation schedule and the speedy trial program that all the remaining motions which have been filed now for over a month, would be disposed of, preemptorily tomorrow, and that I set the day aside, especially, to dispose of these matters. He requested of me, when, Mr. Cocoziello, a couple of days ago, two days ago --

MR. COCOZIELLO: Around Tuesday, your Honor.

[3]—THE COURT: Whatever, two days ago, in order to protect their rights, would I please consider their motion to admit, pro hac counsel for defendant Fuller today.

I have not reviewed the --

Counsel, you'll have to move, the Prosecutor is here.

I have not reviewed the motions in the Fuller matter, and I had assumed that a notice of motion had already been filed to admit -- what is his name, Pritzker, pro hac. I agreed, believing that the motions had already been filed, the papers served under the rule, to hear the motion on short notice this morning at nine o'clock, so that whatever relief, if appropriate, was to be granted, could be granted, before we proceeded with the substantive motions that are to be argued tomorrow.

This morning I came in and was served with notice of motion for rehearing on my earlier ruling on the matter of Chappee, and I was also served now, as I understand it, for the first time, moving papers as to admit Pritzker -- am I right?

MR. ALTMAN: May I clarify that?

[4]—THE COURT: Am I right?

MR. ALTMAN: For Pritzker, yes, but there is a prior motion to admit pro hac veche on behalf of Fuller, Mr. Keith Stroup, which was filed May 13th. That's the motion that inadvertantly was not listed when the earlier pro hac veche was heard by your Honor, that's been before the Court.

THE COURT: All right. So the only difference here is the moving papers.

MR. ALTMAN: That's correct. Today there's an additional motion, pro hac veche, for Mr. Stroup's partner, Mr. Pritzker.

For the record, Richard Altman, Pellettieri, Rabstein & Altman.

THE COURT: Pleased to see you here, sir.

MR. ALTMAN: Good morning.

THE COURT: Remember telling me yesterday you were too busy to get here, you would send an associate.

MR. ALTMAN: I was going to send an associate to take the fireworks tomorrow.

THE COURT: First, in regard to the motion for rehearing, I didn't know it was coming and certainly it doesn't, isn't filed within [5] enough time, under the Rules, on notice of motion.

Accordingly, having not complied with the time requirements of the Rule, the motion is denied.

Alternatively, if I am wrong, I rule alternatively that apart from denying it for having been not notified and filed within time, I alternatively rule that the appropriate disposition of my ruling on the motion is leave to appeal to the Appellate Division, as opposed to a reconsideration of the issues I have already raised.

I have reviewed the letter amended and in essence the letter submitted both as part of the rehearing and as part of the application here is a letter dated July 8th, which I assume the Prosecutor has just now been handed and just now reading and of course does not have the opportunity to reply, either by way of the number of cases that are cited in this -- how many pages? Pages aren't numbered. Eight-page, single-space letter.

Now, then, so, in regard to the matter as to a rehearing and I have not, this was just [6] handed to me when I walked in the office ten minutes ago, fifteen minutes ago, I have not had an opportunity to read this letter, much less, and every page is at least four or five cites, lot of out-of-state cases, lot of Federal cites, and I obviously have not had an opportunity to read it.

Anyway, the motion for rehearing frankly is denied. The facts are before the Court, the Court has ruled, it is either right or wrong and will stand on the record before the Appellate Division.

Mr. Altman, I'll hear your application in regard to Mr. Fuller.

MR. ALTMAN: Thank you, your Honor.

Your Honor, with respect to our motion for the admission of Keith Stroup, pro hac veche in this matter to represent Glen Stephen Fuller, --

THE COURT: Well, now, Pritzker, right?

MR. ALTMAN: Well, I have both the motion of Fuller before your Honor, and the motion of Pritzker, those two

gentlemen are partners in the law firm of Stroup, Goldstein, Jenkins and Pritzker, which is a multi-state firm, with each of the four principals having an office [7] in a different state and being members of different bars.

First I would like to call your Honor's attention that Mr. Stroup and Mr. Pritzker were admitted pro hac veche on motion for probable cause hearing in this particular matter. I don't know of any provision under our Rules requiring that counsel be admitted on more than one occasion. It's my understanding that when a motion is made, you're admitted, they're counsel of record, unless there is some reason why the Court would cause them or feel that a hearing were required to have them be relieved.

So, I think procedurally that maybe the posture we're at and quite candidly I'm unable to find any case in this state which would say definitively that an admission for probable cause hearing is an admission for all purposes, but the Rule certainly has no limitations. So, I'd like to take the position, I'd like to ask the Court for a ruling on this as to whether we are moving the motion for the admission properly here now or whether they're actually counsel of record as outside counsel, together with my firm, Pellettieri, Rabstein & Altman, as local counsel, [8] on account of the admission pro hac veche by the Judge that heard the probable cause hearing.

THE COURT: What municipal court, part-time judge did that?

MR. ALTMAN: That was judge, I think a -- Judge Richman, that was in the East Brunswick Municipal Court on November 24th, 1980.

THE COURT: All right, Counsel. In that regard I would tell you that the Superior Court file that I have before me in no case shows a notice of appearance by any out-of-state counsel. There is no order in the file which indicates an admission pro hac, and I further point out to

you that as far as I can see, there certainly was no indication in the Court, municipal court, as far as I know, there's nothing in the file to indicate that the necessary requirements of papers showing attorney in good standing of another jurisdiction were filed with the municipal court, and I would be very frank to say to you and I both understanding municipal court practice that was highly unlikely. What happened is, you walked in and Mr. Richman on the night with two guys said, these are two nice guys from out of state, he said, okay, let's go. I do not, in any sense, [9] view that informal procedure as either approval or a compliance with the necessary rules for appearance of out-of-state counsel.

So, as far as the record is concerned, both in terms of filing of appearances and otherwise, I am satisfied that the only attorneys of record before the Court are New Jersey counsel. So, this is in fact an application to admit pro hac, under Rule 1:21, and I so construe it for purposes of the Appellate record.

MR. ALTMAN: Thank you.

May I proceed, your Honor?

THE COURT: You may, sir.

MR. ALTMAN: First of all, we filed our appearance in this matter which should be reflected in the Court's records, on May 8th.

THE COURT: Correct.

MR. ALTMAN: That appearance was filed designating us as co-counsel with the firm of Stroup, Goldstein, Jenkins & Pritzker. I know, I do not intend that to mean that that's binding in any way on the Court or that obviated the need for a motion. I just want it to reflect that to point out that the history of this action reflects that from the outset it was my under- [10] standing that we would serve as, Pellettieri, Rabstein & Altman, as local counsel

in this matter. We promptly filed a motion for admission, pro hac veche, on behalf of Keith Stroup, of the firm of Stroup, Goldstein, Jenkins & Pritzker. That motion was filed on May 13th and on May 14th the motion to suppress, which I think may very well be determinative of this entire case was filed.

Now, I'm anticipating a little bit some of the information that I've gathered, gleaned from conversations with Mr. Cocoziello with respect to your Honor's ruling on his motion for admission pro hac veche for Mr. Van Ness, on behalf of Mr. Chappee.

THE COURT: And of which you have a transcript.

MR. COCOZIELLO: Was delivered this morning, your Honor.

MR. ALTMAN: I don't have that, but --

THE COURT: I thought by now you saw it 'cause I know it was prepared yesterday. You did get it, didn't you?

MR. COCOZIELLO: Yes, this morning, thank you.

[11]—THE COURT: Okay.

MR. ALTMAN: And I would point out that after that time these motions, to the best of my knowledge, my office has never requested an adjournment and I don't take any great credit for that, your Honor, because I never had any need, as far as I knew, to make any application for an adjournment. My role was very limited, as reflected in the affidavit I filed with the Court this morning and the affidavit that's been filed by my client, Mr. Fuller, and that I was to serve as local counsel to comply with the Rules of Court to file pleadings and sign pleadings, to be responsible to the Court for conduct of myself, as well as out-of-state counsel.

In any event, my understanding is that although we are here now on July 9th, hearing the very same application

that was filed some two months ago, it was not an adjournment requested, only addressing myself to the Court's concerns for delay and speedy trial, there was no request for an adjournment made by my office.

However, by no means does the Defendant contend that his rights would be violated, if this matter did not proceed tomorrow to the [12] substantive motions.

Additionally, I understand from Mr. Cocoziello and I have no independent knowledge of this, that he requested, but one adjournment, that had to do with the fact that he had not received some discovery that was ordered to be made available to him with respect to the jury motions, with respect to composition of the jury and the Court ordered the matter continued pending his receipt of that discovery.

So, the best of my knowledge, there haven't been any delays and I can understand the Court's concern with the case like this as to whether or not there's any attempt or effort on the part of defense counsel to purposely delay disposition of the matter.

THE COURT: Oh, I don't think there's a purposeful—well, in a sense of is there a purposeful attempt to be dilatory, no, I'm not, I've seen both counsel, first time I've met you, Mr. Altman, I am satisfied that it is not a dilatory purpose, a number of issues have been raised, but because the issues that have been raised in motions require disposition, obviously all of them will be the subject of [13] interlocutory appeal, should the rulings be adverse, I can anticipate, and only a fool would look at this file and wouldn't anticipate an extended procedural matter. I am sure that should any of the rulings on the substantive motions be adverse, necessarily, you will believe and to protect your client's rights, that those matters must be pursued by way of interlocutory relief, and I think you would agree it would be foolish for me to think otherwise.

MR. ALTMAN: I agree, your Honor.

THE COURT: So I am facing an extended procedural time in this matter, not by way of the bad faith, please understand what I'm saying.

MR. ALTMAN: Okay, I appreciate that.

THE COURT: Okay.

MR. ALTMAN: And I would add to your Honor's remarks to be perfectly candid, if your Honor's rulings are adverse to us this morning, we would seek relief on an interlocutory emergent basis, as well.

THE COURT: And let me say also that it was understanding that that I permitted you to come in, in the middle of a trial in which I'm going to go to the jury, in about fifteen minutes, [14] understanding that I permitted you to do that, which I did not have to do. I could have forced you tomorrow to the motion.

MR. ALTMAN: That's correct.

THE COURT: So I have not tried to defeat your rights, under the matter, I've tried to give you a full hearing and still give you an opportunity at the Appellate Division, which I didn't have to do. Go ahead.

MR. ALTMAN: We appreciate that.

With respect to the merits of the application, your Honor, first I'd like to point out that Mr. Keith Stroup, who is a member in good standing, of the DC Bar and a member of the firm Stroup, Goldstein, Jenkins & Pritzker, is an experienced trial lawyer, experienced criminal lawyer. I'm not suggesting that this case has issues that cannot be dealt with, it would be foolish for me to suggest that, by any lawyer in the State of New Jersey, but I do point out that Mr. Stroup, and that's what the rule really requires, is a competent attorney and at this juncture, and faced with very significant motions tomorrow morning, is

far more competent than any member of the State Bar, to proceed tomorrow [15] morning to handle these motions. He's much more acquainted with the law, as it relates to these particular motions and even more importantly with regard to the motion to suppress, which is a credibility question and a fact question, he is far more familiar with the facts of the case.

The same can be said with regard to Mr. Pritzker, who is his partner, as a member of the Illinois Bar, he's a member of the Third, Fifth, Seventh, Eighth, Ninth Circuit Courts of Appeal. He has been admitted pro hac veche and practiced in the criminal case in the State of New Jersey, in Somerset County, in 1975 or 1976, and I would just, for the record, amend my affidavit which reflects it in the conjunctive, rather than the disjunctive. It was one appearance and he has presently been admitted pro hac veche and handling a criminal case again arising out of county.

I bring this to your Honor's attention to point out that these gentlemen are lawyers, competent lawyers, skilled lawyers in the area of criminal law and at the present time are the only lawyers in this case representing these [16] defendants that are prepared to proceed with substantive motions in this case.

I would also point out that they are members in good standing and that I am more than glad to serve as local counsel in this case, in compliance with the rule, and I stand ready to account to this Court, personally, for the conduct of Mr. Pritzker and Mr. Stroup, throughout these proceedings. I've only had occasion to meet them personally in the context of this matter, but before agreeing to serve as local counsel to them, I spoke with a number of my associates who practice in the State of New Jersey, who have dealt with them in other matters, and I have put in my affidavit that on representation, they have the highest respect among other attorneys practicing in this

State, attorneys whom I respect and respect their ability, one being a member of Mr. Cocoziello's firm, who is Mr. Silber.

I would point out further, that I recognize --

THE COURT: That's the same Alan Silber used to be Mr. Brown's associate, am I correct?

MR. COCOZIELLO: Yes, your Honor.

MR. ALTMAN: That's right.

[17]—I would point out, your Honor, that the cases in New Jersey do not, and I don't suggest that our law present, this present posture of our case suggests an absolute right to counsel of choice, that extends beyond the State of New Jersey, but I would suggest to you that in the Cavanaugh case, the Supreme Court, it was implicit in that decision that they give great weight to a defendant's choice of counsel, that they want to accord to counsel, accord to a litigant or defendant the right to choose his own attorney. In that case, they pointed out that they felt that other members of the bar of the State of New Jersey would be equally qualified to handle a matter that out-of-state counsel, in that case, Mr. Bailey, could handle, but Mr. Bailey was stripped of his right to appear as out-of-state counsel, basically because of misconduct in this Court, and not for any general proposition adverse to admitting out-of-state counsel, and I would suggest that just simply by the enactment of the Rule in this case, there's a public policy evinced by our Supreme Court, that in appropriate circumstances and in compliance with the rules, out-of-state counsel [18] are permitted to appear and practice in this Court. We've complied with the Rule in that they have obtained local counsel to be accountable to your Honor.

I would point out further, and I, I'm not prepared to proceed tomorrow, I'd like tc be heard on this, after the motion for pro hac veche, because I was retained on a very limited basis, as set forth in my affidavit. Mr. Stroup

was authorized by Mr. Fuller, which is reflected in Mr. Fuller's affidavit, to retain me as local counsel to comply with the rule. I don't know if you, if your Honor and I have a different interpretation of the Rule, but I do not believe that that rule requires local counsel to pursue a parallel tract with the out-of-state counsel and be prepared in the same manner and with regard to the same issues that the out-of-state counsel would be. In fact, I would submit that that would be self-defeating and at cross purposes with the concept of having an out-of-state counsel who, for one reason or the other, either his expertise, or the choice of the defendant, is permitted to come in and practice and address the particular substantive issues in [19] the case. The litigants have made very clear, in their affidavit, in Mr. Fuller's affidavit, that he wants to be represented by Mr. Stroup and Mr. Pritzker, who are members in the same firm.

I would point out also, that I can't envision problems that would arise by virtue of your Honor permitting the admission of out-of-state counsel here. There has been no problem to date. These attorneys and their clients have appeared at each juncture of the proceedings, as directed by the Court. That is the way they practice in multi-state practice. It's my understanding and it's set forth in an affidavit that they have never failed to appear before a court when directed, unless they were on their feet in another matter, and that is a situation that could arise equally in a case where the clients would be represented by local counsel, and again local counsel would be here to communicate such circumstances to the Court. Moreover, there are two individuals from the same firm being asked to appear, if one is on his feet somewhere else, I would think that the other could appear.

So, I cannot anticipate that the Court's [20] calendar or that the convenience of the Court would be interrupted by virtue of the fact that out-of-state counsel was representing Mr. Fuller, as opposed to in-state counsel.

I would like to emphasize further, that these individuals, Mr. Fuller did not choose me to be his attorney, other than for the very limited purpose that I had represented to you and in fact, I have never debriefed Mr. Fuller with respect to the motions that are pending before this Court, in particularly, the motion to suppress, which you will require live testimony. I think that your Honor should give very careful consideration to the defendant's right, a limited right, I acknowledge, to choose counsel of his choice, and more importantly to have counsel that can serve in an effective manner and I don't like being before a court and have to say on the public record that I can't proceed with a matter when scheduled in an effective manner. I've never said that to a Court before, and I don't know whether your Honor's familiar with me or not, but I know that my reputation is to be prepared. I think that's my legal duty, as counsellor, and personally I would not be comfortable serving in [21] any other capacity, and I'm faced now with a choice of being forced to proceed representing someone who neither wants me to represent him, although I don't know that that choice is forever, because I haven't even spoken to him about it, I just have his affidavit. More importantly, I don't care to represent him at this point because I feel like, and maybe raise a Thirteenth Amendment argument here, that in a way, I'm being forced into involuntary servitude. I have a very definite contract as to what I would be doing here as local counsel, and now I'm counsel fully in the record, and I hate to sully the waters with such mundain and practical considerations as fees, but I haven't been paid to be involved in a case like this, and I think that I'm entitled to it, and I don't think my client should be required to pay out-of-state counsel, were they admitted and I were to be expected to be prepared in the same manner with regard to all of the same issues as out-of-state counsel. I think again that the idea, that idea is at cross-purposes with the concept of out-of-state counsel, under our Rule, and I

only point that out with respect to your Honor's scheduling of the [22] substantive motions for tomorrow.

So, at this point, I would like to simply ask your Honor to reconsider your inclinations, I know you haven't ruled yet on this particular matter, but I would ask your Honor to seriously reconsider. I think we're getting into a terrible problem here, if I'm forced to proceed. These people are just not going to be given proper assistance of counsel, in a very serious case, with very serious consequences to them. I know this Court's reputation for fairness, I know your Honor was both a public defender and a prosecutor, I don't mean to soft soap the Court, I mean to talk very straight to you as knowing that this Court is fully knowledgeable of the realities of these cases, and have you reconsider, notwithstanding that you've taken a big step forward, I suppose, in one direction here, and ask you to seriously consider allowing Mr. Stroup and Mr. Pritzker to serve as out-of-state counsel in this matter. I pledge to your Honor that there will always be somebody from my office available to be here as local counsel in the matter and I'd ask your Honor to rule on this application before, I have several subsidiary applications that [23] I might address to the Court, depending upon --

THE COURT: I cross one bridge at a time. I'm going to rule on this.

MR. ALTMAN: Fine, and I may point out that I drew a form of order and I brought the order.

THE COURT: Mr. Cocoziello will tell you I suggested you bring the form of order.

MR. ALTMAN: Yes, I brought the form of order reflecting the Court allowing admission of out-of-state counsel, trying to proceed in the positive fashion, and recognizing the Court can always change the form of the order.

THE COURT: All right.

Mr. Graves.

MR. GRAVES: Judge, I really don't, the State really doesn't have much in position --

THE COURT: Do you oppose or consent?

MR. GRAVES: I heard your comments the other day, I basically agree with the Court that since we are enmeshed in this tremendous new speedy trial system that does nothing but needlessly bog the system down to have to attempt or maybe successfully arrange to have lawyers come in from all parts of the state, much [24] less all parts of the country. You know me, Judge, I'm more comfortable when I'm picking a jury than I am when I'm sitting here with a bunch of papers in front of me. We necessarily have a lot of motions to wend our way through, and it would appear to me that the Court's position is a correct one, in a case of this nature, and given the particular times that we're involved in, as I said, the speedy trial program and the push, as it were, by no less than the AOC and the Supreme Court to move these cases. I frankly don't see, I was interested in the comment I think as to Mr. Pritzker, the comment, he's far more qualified than any member of the State Bar. I assume that maybe what Mr. Altman meant was any member of his firm, who are members of the State Bar. I can't believe that Mr. Pritzker's more qualified than any member of the Bar of the State to process this case. I think the Court's term was, there's no magic in the case. It's a Turnpike stop, there's a heavy weight of cocaine, and there are some fairly severe penalties involved, but it's not a magic case. I don't frankly think it requires out-of-state counsel, other than for the reason that Mr. Fuller and [25] Mr. Chappee, apparently want these people. I don't think they're entitled to it, as a matter of right. I think the motion is discretionary with the Court, under the rule, and I basically agree with the Court's ruling in the Chappee

motion, and take the position that the ruling should be the same in the Fuller motion for the same reasons.

THE COURT: Thank you.

The matter before the Court calls upon it to exercise its discretion, pursuant to Rule 1:21 as to whether out-of-state counsel should be admitted pro hac in this matter, and I am satisfied, as I was the other day, that Mr. Pritzker and Mr. Stroup are members in good standing, that Mr. Pritzker and Mr. Stroup are members in good standing, in their respective bars, and while the affidavits talk in conclusionary fashion about their specific degree of experience, I am sure that they are experienced able trial counsel. In exercising the discretion that the Court must do, under Rule 1:21the Court must consider and does consider a number of factors. Those are the facts that were discussed at length at the Cavanaugh case. As I say, the Cavanaugh [26] case, which comes in two kinds of cases, one is Cavanaugh, and the other is In Re: Bailey, wherein although not necessary for the disposition of the matter at hand, certain suggestions and guidelines are offered for consideration in admission of pro hac counsel.

Of course, Mr. Bailey was an attorney in good standing in the State of Massachusetts and then practiced in many other jurisdictions, at the time. That in and of itself, of course, is not dispositive of the issue for the Court here. The Court must consider the degree of difficulty presented by the case at hand, the nature of expertise necessary to adequately defend the persons accused of crime, and of course must accord wherever possible the great consideration to the individual wishes of a defendant to choose counsel of his choice. That of course is not an unfettered right. If it were, then Rule 121, would not in any way, shape or form be constitutional because certainly all the historical developments of admission of practice law in various states has been one which the Federal Courts have accorded a great deference to and have generally not in-

terfered with. So, clearly, [27] I think the fact that a state perceives to limit out-of-state attorneys to practice is appropriate, as long as it does not enfringe on any guaranteed constitutional rights and the Rule or the provision of pro hac admission, as exists, I believe in every state of the Union, has never been declared to be constitutionally infirmed.

So, the Court must then consider the issues presented here. The record will reflect that the defendants were arrested in the course of operating their motor vehicle on the Turnpike. There was a search of the motor vehicle, which I may say, and I know Mr. Altman is an experienced criminal counsel and I'd like to have a dollar for every time you cross-examined a trooper on the Turnpike stop and search, and I've done it, you've done it, Mr. Cocoziello has done it and that's nothing new, you know, they're either they come under one of the various exceptions where you try and move the cop on credibility and, but there are just so many places you can go on a motion to suppress, on a warrantless search on a car. However, there's probable cause, exigent circumstances, how far does consent go, how far [28] does plain view go, are we searching for indicia of ownership. We are all, those of us who practice in the criminal field, Mr. Altman and I note for the record, your particular expertise in that area, we are all familiar with the various exceptions in the State of the law, and that perhaps the extensions to which reasonably it may be taken. I mean, on the bare facts of it, I frankly, outside of the fact that this is a lot of coke, and therefore a lot of money involved and that the term of imprisonment or exposure is greater than you would have otherwise, outside of that, all the indicia surrounding the arrests, nothing out of the normal, does not present any great deal of difficulty, and I'm fully satisfied that there are numerous counsel in the State, not the least of which is Mr. Brown, Mr. Silber's former partner. I know there are some guys around, Mike Querques, any number of others who

have, are articulate, able and imaginative counsel. I don't think there's anybody more imaginative than Mr. Brown in this state. I've been an adversary, I've been a co-counsel of his, I understand. There is a more than adequate [29] number of counsel in regard to this matter.

The question raised by defense counsel is that a number of motions which are returnable tomorrow, which have been adjourned, I think these originally made returnable -- when? Originally --

MR. ALTMAN: I know that the motion to suppress, your Honor, was filed May 14th.

THE COURT: Originally made returnable early June, about a month ago. I think my original number was right. Are pending, and counsel says that these require expertise and will produce some problems.

There's a motion to dismiss Counts One, Two and Three, which is the possession count, having to do with the controlled dangerous substance, possession of methaqualudes and possession of cocaine. Whether or not they're duplicitious, straight legal argument, really, nothing so unique that hasn't been encountered by the Court or counsel before.

Another motion pending is a motion to sever Count Five, which is, if I recall properly, that's the gun, isn't it?

MR. COCOZIELLO: Tear gas, your Honor.

[30]—THE COURT: It's a straight thing, nothing unusual in that.

What do we have here? Then we have a motion to dismiss the Indictment, based on the jury array, on grand jurors, and that I'll get back to in a minute.

Then there was an interesting motion for leave to file what I call, leave to file anything I can think of before

we get to trial, in case anything good comes up, and a motion for discovery, which I think we've disposed of one way or another. Haven't we? I may not have. No, that's right, I put that off, but again, nothing unusual.

As to the motion for dismissal, it is based on one step further, on arguments that have already been made with an additional little tick to the end. There is of course numerous authority, not the least of which is *United States versus Zirpollo and Jacks*, having to do with under representation of women in the grand jury.

This takes the case one step further, this particular motion, and the proposition that the defense would have us accept here is that four [31] persons of grand jury exercise, I think I read the thing, talked about four kinds of leadership roles, and that therefore the foreperson, the sexual identity of a foreperson as a material or significant factor and that there are such varying views and approaches of feminine as opposed to masculine forepersons that that in some demonstrable way affects the grand jury's ability to consider probable cause to bring a matter on for trial, in that there is a material by a sociologist and others to be argued.

However, the brief is at length, says everything you want to know about grand juries and the rest of it. That is one step further extension of earlier argument, earlier made and although while at first blush it seems to present something novel, it just requires the Court to take one step further and lastly, there is a motion, if I recall correctly, there's a motion to suppress, which is again a straight testimonial. We've seen that a lot of times.

Lastly, we have an extensive brief which I suspect has been filed in form and probably in a number of other jurisdictions, dealing with [32] whether or not the statutory classification of cocaine is based upon reasonable and material judgments or whether or not there's an arbitrary

and capricious matter. Again, challenges of such a nature have been heard before as to other statutes.

The bottom line is, and I say this respectfully, and again as you said, not blowing smoke at anybody, respectfully Mr. Altman, Mr. Cocoziello, I've read those motions and I know your reputations, and I can't believe that either one of you are so dumb that you can't perceive the arguments and make those arguments and argue yourself.

So, I'm satisfied there's an adequate degree of expertise available in this state to handle any of these motions.

The bottom line is to what extent and what weight is Defendant's right to counsel in jeopardy by the Court exercising such discretion? Clearly the policy is if at all compatible with the representation of defendants, to admit competent outside counsel. I can see that and perceive that to be the policy in the Rule. At least, the modern rule. We used to much more restrictive, but [33] the Court must also consider the nature of the case, the degree of managing the calendar and the cause at hand, and I made some notes. First, while it is true that the subjective or the, not the subjective, but the private agreements and understanding of counsel as to their role in this case is of interest to the Court, it is not of course binding on the Court. An appearance is an appearance under the Rule and makes you an attorney of record. The fact that either counsel may have at one time, relied on a Court exercising its discretion under the rule in their favor, is not a reliance that the Court can take into consideration in this matter. I note and I say with some sadness, one of the difficulties in handling out-of-state cases is that we have a situation here where now months after the indictment and even after the motions were filed, certified to by local counsel, they have not even met their clients or talked to them until apparently this morning, where I see a notarized statement of one defendant. To the extent that local counsel is responsible, local counsel as attorney of record,

may at sometime, if out-of-state counsel is unavailable, be compelled to [34] proceed with the matter and we are in precisely in the bind today that is the problem I foresee in this case, and that is that because of a prior adjournment, because of perhaps some unavailable information and partial request by defense counsel and concededly perhaps an omission on my staff's notifying other counsel to proceed on the motion last week, but we have a situation where motions have been listed, testimonial motions. The Court has reviewed these papers and motions at length, and we have a situation where local counsel is now saying although knowing as of at least late last week, that we were going to proceed without fail tomorrow on the motions, that they are not ready, and perhaps counsel will have to withdraw and certainly if counsel withdraws or is severed from the, or fired from their position as counsel by their clients 'cause they're not comfortable with them, further delay is built into the system. While it is true that these counsel may well have fine reputations and practice in a number of jurisdictions, there are things like airplanes, there are air, air traffic control strikes, for instance, they're eminent, they're going to be, as I perceive it, [35] this case is going to be fought tooth and nail, beginning and end, every adverse ruling will go by way of interlocutory relief. There's nothing wrong in that, but if I don't foresee it in the scheduling of this case, I am a fool. It's going to happen, we're going to be going back and forth.

While it may be true, except when he was on his feet, out-of-state counsel always came when ordered, I'd love to know how many times matters were adjourned because most judges, notwithstanding editorials in the law journal, most judges give a fairly reasonable ear to requests for adjournment and are you then going to force local counsel on, when out-of-state counsel can't be there. I'd love to know how many times matters have been adjourned. I suspect there are many. If I have in-state counsel, I can pick up the phone and talk to a judge in another juris-

diction and usually work out a much prompter schedule in the disposition of this case. Every matter that it must proceed, if we proceed with out-of-state counsel, require notification of out-of-state counsel, they have to meet with their clients, who do not necessarily reside in their own jurisdictions. There is a built-in two and three-week delay on every [36] communication in this matter. It's just, that's just the nature of the mails, that's the nature of travel, that's the nature of transit in the matter.

Yes, they've been admitted in the Circuit Court of Appeals. I might add that being admitted for Appellate purposes is a lot easier, you know when you are going to get your Appellate argument, the Appellate Court is a gentleman's court, able to do things usually with adequate notice and time. The trial court works around a rather changing and liquid schedules and sometimes short notice. I dare say that if I have two New Jersey counsel in a matter and I had to dispose of something important in this matter, a phone call, especially in a case of this significance, would bring counsel promptly within a day or two, at the least. That just simply would be impossible with out-of-state counsel.

Should there be parallel track preparation? The answer, Mr. Altman, is, I suspect yes, because counsel must not only vouch for out-of-state counsel, but I think must stand ready to proceed. That's part of, I think part of the representation. Reach every nook and crannie, no, but a [37] broad brush, yes. And again I think as classic is the position, the Court is placed in here. "Judge, if we have to go now, I'm not ready, we've got to go to the Appellate Division. If they keep me in the case, then, Judge, maybe I'm going to have to get out, maybe I got to get paid more, maybe the motion isn't going on tomorrow" and then that means the motions are not heard until August, sometime. If I make rulings adverse to a defendant, back up on appeal. Who files the appeals? When do we get there? We then are looking, realistically in this case, even

at the best of dispositions, if I dispose of all of the motions tomorrow, and the necessary leave to appeal is filed, the earliest we're talking about getting to this case, realistically, would be October, not even October, November, December at the earliest. If I string the motions out to August, if I let out-of-state counsel in, we're talking earliest disposition, realistically we've all been in this business a while, earliest next spring, when the case is a year old and probably longer.

So, I've gone on at length, but certainly if defense counsel wishes to appeal, which is their [38] absolute right to do, and I have no quarrel with, nor do I take it as personal in any way, shape for form, clearly my considerations, for purposes of the record, should be laid out and my concern, again, is not that there is a difficulty in this case, I've reviewed the motions and I am satisfied and I exercise my discretion in saying that they do not present, while they present some novel points, they do not present points so difficult in logical conception or precedent in authority to be of such degree not to be comprehended by counsel right in this room, forget the rest of the state of New Jersey. Even Mr. Graves, I think, can understand this.

Is that true, Mr. Graves?

MR. GRAVES: I think I can, Judge.

THE COURT: Okay. A fortiori, gentlemen. I won't say it was a priori, and as I said, I'm satisfied there's enough expertise here and I am satisfied that the involvement in this case and it has to be understood we're talking about two things. I'm talking about out-of-state counsel and I, I play the role in my decision, in denying last week and I didn't articulate in the opinion and I should have, one from Aspen, Colorado, one from [39] either DC or Illinois, or wherever, plus local counsel, plus out-of-state defendants. There are too many unknowns in that equation. It's going to be difficult just with the out-of-state

clients and in-state attorneys to run anything like a reasonable motion and Appellate schedule, which occur in this case, without adding two lawyers from two different states, who have multiplicity of obligations and to run it all at the same time. We have enough problem in co-counsel cases, now, where, you know, one guy is available, the other guy is not, Judge, what are you going to do, what are you going to do and going to wind up way down the road, a long, long time from now, maybe getting to the case.

I am satisfied that within the context of my discretion, under Rule 121, that that is a competent and reasonable consideration for the Court to review. I am satisfied the nature of the probable delay, notwithstanding dilatory and intentional, just good faith delay, and it will occur as a result of this matter and difficulty in scheduling Court's disposition, is so grave as to overcome the "unfettered" right of defendant to counsel of his own choosing, and accordingly, [40] the motion to admit pro hac is denied.

MR. ALTMAN: Your Honor, I was trying to catch you until you finally dropped the gavel, just wanted your Honor to be aware that the out-of-state counsel would be prepared to proceed tomorrow.

THE COURT: I've ruled.

MR. ALTMAN: Okay.

THE COURT: That would not have affected my ruling in any event.

MR. ALTMAN: All right, your Honor.

May I first ask for a stay? As you know, I'm required to do, before we go seek a stay from the Appellate Division.

THE COURT: I tell you what, Judge Seidman is right upstairs and I'm going to sign your order for you, and I'm going to let you run upstairs.

MR. COCOZIELLO: Judge --

MR. ALTMAN: Think they may ask us if we made application to your Honor for a stay.

THE COURT: Am I going to stay tomorrow's proceedings?

MR. ALTMAN: Yes.

THE COURT: No, that's denied also.

[41] MR. ALTMAN: Okay. May I --

MR. COCOZIELLO: I know your Honor has ruled on my motion for rehearing. I just, so the record is clear --

THE COURT: Let me say this, to the extent, alternatively I denied it because the notice of motion was not filed within time, alternatively I think I ruled that the appropriate form of relief was to the Appellate Division, as opposed to motion for rehearing.

Thirdly, in the alternative, and even assuming those first two are wrong, I now, for purposes of rehearing and ruling, incorporate all the argument and decision I made herein on this motion, incorporate it as a new denial on an application for rehearing for your application for Aspen, Colorado counsel.

MR. COCOZIELLO: Just so, your Honor, my position is clear before your Honor. Mr. Van Ness is in Court today, as are Mr. Stroup and Mr. Pritzker and our alternative request to the Court today was to present testimony of these individuals, as well as the clients who are present in Court, as to why they should be admitted pro hoc veche. I think the motion for [42] rehearing brought new facts to light to the Court, and that was the basis for the motion, rather than just a rehashing of the other motion.

I respectfully submit that a hearing should be had and I request that your Honor conduct such a hearing.

THE COURT: The application is denied. I am satisfied from the pleadings before me as to the issues in discretion,

in the pleadings that are submitted are indications from both defendants, and that's part of the file that they did not wish, they hired, they say gentlemen, individually and it was their intention and request to file them, I'm satisfied they are both competent and able gentlemen, and perhaps may regard my rulings as hopelessly provincial, nonetheless it exists and I will give you recourse to the Appellate Division.

Let me know what the, before the day is out, what the appellate division has done.

MR. ALTMAN: Your Honor --

THE COURT: Yes, sir.

MR. ALTMAN: We are, it's my understanding, that the clients wish us to proceed to make leave to appeal your Honor's ruling here, now, [43] but alternatively, I'd like to ask the Court to consider, in light of your ruling, indicating that out-of-state counsel not participate, in your denial of a stay of tomorrow's proceedings, I would like to make a formal application for an adjournment of tomorrow's proceedings, on the assumption that I am now local counsel, as I have been responsible for this matter. I don't want to reiterate, bore the Court with many of the arguments I've made, I just want to bring a couple of additional circumstances --

THE COURT: Well, I'll deem all your earlier arguments incorporated.

MR. ALTMAN: In addition to the right of attorney of choice, one I would like to point out with regard to the money that is not my consideration, if I had to proceed with no additional compensation, it wouldn't be the first time, and that's fine with me.

THE COURT: And unfortunately probably will not be the last.

MR. ALTMAN: And it won't be the last. The thing I'm most concerned about is, my preparedness. Now, I don't disagree with your Honor's position that this is a credibility issue on the [44] motion to suppress, and that we're not dealing with particularly complicated legal issues, but if your Honor was suggesting that it's an easy matter to prepare for, and I don't think that you were, but if that was the Court's intention or the Court is suggesting that from the time I learned, and I really only learned when I called your Honor, I called you immediately upon learning that this matter was proceeding with the motions Friday, it's not an easy matter to prepare for, and I have done a number of these matters before. We have to search through a file in these circumstances, and look for every indicia, every bit of evidence that might, extrinsic evidence, et cetera, that might tend to tip the balance one way or the other with respect to the credibility of the witness, and I, my experience has been that that's a process that takes a considerable amount of effort and thought, deliberation and all of those things require time.

THE COURT: Can I ask you a question?

MR. ALTMAN: Yes.

THE COURT: Would it not be fair for the Court to assume that since you were relying on the [45] Court to exercise its discretion on the pro hac issue, and since the motions were scheduled for tomorrow and at least a week ago your office was notified by phone that that was so, I assume relayed it, certainly you've already indicated to me that out-of-state counsel are ready to proceed tomorrow, they obviously have done all that preparation and are ready for it. Is that right?

MR. ALTMAN: They have advised me that they are ready to proceed tomorrow.

THE COURT: Therefore, I am sure, that they can convey to you their preparation issues and analysis, as well

as any witnesses or extrinsic issues they are going to go with, right?

MR. ALTMAN: I can't disagree that they can speak to me and tell me what they think is relevant. Myself, as a litigant, and as an advocate and my experience on my feet, I can tell you, with all sincerity, that I can't be possibly be ready to proceed tomorrow with a feeling that I'm doing justice to my clients or to the Court.

THE COURT: All right.

MR. ALTMAN: And I don't know what the [46] foul up, Judge, was, but I only learned when I called you as to the posture of this case, both with respect to the denial of pro hac veche application, as well as the fact we would be proceeding. And I, within the confines of my schedule, and I don't want to say I'm the busiest person in the world, but I am a managing partner of a firm that has 60 families to feed, and within the, within what I could, I took the file and began to do that work, and I stayed up very late reading this, but I have not yet talked to the clients about it. In reading it, I had a feeling just based on experience, that there are pieces of information that I don't have. There are a couple of reports that I don't have, that I think may tend to be relevant, in the proceedings that may tend to influence the decision of this Court, one way or the other, with respect to the credibility factors.

THE COURT: Well, are you telling me then that after your review of the matter, that you have perceived issues and material that are necessary, that perhaps out-of-state counsel have not so perceived?

MR. ALTMAN: Judge, you're, I think you've [47] ruled on the out-of-state --

THE COURT: You're hoisted on your own petard.

MR. ALTMAN: Right. I don't want to be there, I can only speak for myself, and I can't even say that there's

a fixed, firm belief on my part to that effect. It was just the feeling, I went through the file, I stayed up very late doing that, and I'm not prepared to proceed and I don't have, I don't think I even have to, I don't want to go at length about this.

Now, my problem is, I have indicated, if I'm directed to proceed, I will cancel all my appointments today. I have no choice, if your Honor directs that, and I will do the best I can to prepare for tomorrow, but I don't think I can be adequately prepared. Among my appointments, I am Central New Jersey Chapter Chairman of the American Jewish Committee. I have a meeting that was called for this afternoon in my office to plan the year's events. I have people coming from New York State, the Executive Director. I have to, either cancel that or I have to take those hours out of my day to attend to that business, and if I have to spend all my preparing it, I will, but [48] I still believe that no matter what I do in this limited time, I will not be able to do a service to this Court, and this Bar, that I wish to do and that I feel I've done during my years of practice.

I've made the arguments before with regard to the right to choice on the part of these clients, even if it's limited, even if it's limited to counsel, within New Jersey, as your Honor pointed out, there are attorneys in this state that are capable and they may well want to talk with them, to deliberate themselves, before they choose whether or not to have me proceed as their attorney. At this juncture I do know they do not wish for me to proceed. I have not yet been fired.

THE COURT: Disassociated is a better word. Fired is not the right word, that means something else.

MR. ALTMAN: I would very much like to have an opportunity, at least a week, one week would be adequate for,during that time for them to make a choice as to what they wanted to do, and if they decide to stay with my

firm, then that would give me a week to prepare this motion.

[49] So, I'm not going to repeat all the other arguments. Your Honor knows what the facts are here, and I would respectfully ask that I be given a one-week adjournment.

THE COURT: You join?

MR. COCOZIELLO: Judge, I join, and I might add, as your Honor is well aware, we do intend today to file motion for leave to appeal and to stay your Honor's ruling and of course that is going to comprise the better part of our day, before we, as we go up and seek relief in the Appellate Division, and obviously we cannot be adequately preparing for tomorrow's hearings and argument.

THE COURT: Let me ask you a question. What would you have done if I'd have not given you the courtesy of having this hearing this morning and I said no, tomorrow? Obviously no Appellate Division in the world would have touched my scheduling decision of the matter and then clearly you would have not gotten, even the respet that I have accorded you. I say to you respectfully, gentlemen, and I don't mean this in any derogatory sense -- well, I've laid the reasons for my decision out. Your request for an [50] adjournment, while I appreciate your remarks, I do not find to, at this stage of the proceedings, given the nature of the preparation, the strict time schedules, what we're really saying here, the strict time schedules apply to cases where defendants do not have the funds to hire such effective and illustrious counsel, who have the imagination that you gentlemen, your corresponding out-of-state counsel have had, I decline to accept the proposition that the speedy trial rules do not apply to those cases and if they do, well then perhaps we better rethink the speedy trial rules, entirely.

Motion days were set down in this matter, all motions must be filed by May 14th. Supposed to file these sched-

ules, real well, some necessary adjournments were built in, and now here we are at the end of July. If I understand at all the spirit of the rules and frankly for the reasons I've set forth, notwithstanding the protestations of Mr. Altman, and I commend him for his charitable activity and occasionally those things do interfere with our professional pursuits, I still am not satisfied that these motions are such that they cannot proceed tomorrow, and will proceed [51] tomorrow, unless I am otherwise enjoined by the Appellate Division, and I've given you that opportunity to do that.

Beyond that, deponents sayeth not, motions denied.

MR. GRAVES: I would, for the record, I'm not sure either defense counsel is aware, I recall last week when we had the motions shceduled that the trooper involved was present for another motion, and he was the trooper who was going to be gone this week to Virginia. So, I don't know that we could complete the suppression motion tomorrow.

MR. ALTMAN: Your Honor, my alternative application was to ask for that particular motion day to be continued, and proceed on the others. If that's what we have to do.

THE COURT: Do I understand correctly that there is a joint motion to carry the suppression motion? I guess so, if you are going to--

MR. GRAVES: I think you'd have to term it that, Judge. I recall he was here, and I think, I advised the Court, I think co-counsel had left by that time, but I remember it was the [52] trooper for this motion who was going to be gone for a week, starting I believe Sunday of last week.

THE COURT: Well, if I'm going to delay the suppression motions, what sense is there to push them on the other stuff?

MR. GRAVES: That's up to your Honor. I just, I just—

THE COURT: The famous fade back and punt.

MR. ALTMAN: Our possible salvation.

THE COURT: Kiss him, will you?

MR. ALTMAN: Ready to.

THE COURT: Give the Court all the discretion -- let me think a minute.

I'm going to come in off of vacation for one day for this case. How do you like that?

Motions in this matter, all without fail, both on behalf of anybody and anybody who's interested, all motions -- I've been ready for this for two weeks now -- today is July 9th -- Friday, July 17th, one week from today, nine a.m., rain or shine, neither gloom nor fog of night or whatever, as far as I'm concerned, and unless otherwise enjoined by the Appellate Division we will proceed with these matters.

[53] I will purposely come in off of vacation for you gentlemen alone and the motions will be disposed of. The Appellate Division will either tell me that out-of-state counsel will come in or tell me you're coming in, but whatever their disposition is, the motion is going on.

MR. COCOZIELLO: May I address you with regard to the one jury motion I had filed, as your Honor is aware, we retained a psychologist by the name of John McConahey to perform a study. That study, as indicated, in my certification last week, will not be available for another week. Is it possible to carry that one portion of that motion?

THE COURT: Everything goes on the 17th.

I might say I've reviewed what he's had there, and what you've had there, and my first threshold issue will be whether or not I want to have a testimonial hearing on the issue. I may or may not. If I don't, well, we don't

have to worry about his testimony. If we do, then I'll have to set up a day for it.

MR. COCOZIELLO: Thank you, your Honor.

MR. GRAVES: Judge, you had ordered no further contact with grand jurors until today. [54] Would you extend that?

THE COURT: I requested both counsel to submit to me authority on --

MR. GRAVES: Until tomorrow, excuse me.

MR. COCOZIELLO: That was supposed to be argued tomorrow, and I do have my brief prepared.

THE COURT: Good. I'll tell you what, I'll rule on the papers on that. Okay? You got a letter?

MR. GRAVES: You'll have mine today, Judge.

THE COURT: All right.

MR. COCOZIELLO: Thank you, your Honor.

THE COURT: Thank you.

MR. ALTMAN: Judge, just a couple more matters I'd like to anticipate to clear up.

There's an expert on the constitutional challenge, we'd like to offer testimony by him with respect to that motion.

THE COURT: On the 17th, the 17th, with the exception of the suppression motion, is not deemed to be a testimonial day. If, after legal argument I am satisfied it is necessary to take testimony, I will set a day aside, if not, I will [55] set forth my reasons on the record, with particularity and at that time such recourse as will be necessary will be taken.

MR. ALTMAN: May I also, just for the record, as a courtesty of the Court, just a letter to the Court to the fact that because I don't want it to appear that again that we're using dillatory tactics or what-have-you, it's been

raised to me, it's been brought to my attention by Mr. Fuller that I may be fired or disassociated, as your Honor said.

THE COURT: We'll cross that bridge when we get to it.

MR. ALTMAN: That's fine. Just want to bring it to your Honor's attention.

THE COURT: No. I saw that coming in the papers, and I figure that's the next step and I, if it happens, then we'll deal with it.

MR. ALTMAN: Next step I might move to be relieved, I don't even have the opportunity to deliberate on that issue yet.

THE COURT: No. We'll cross that bridge when we get to it, if the Appellate Division gives you the relief you want, then we don't have to worry about that. If they don't give it [56] to you, then you consider what steps you're going to take next.

MR. ALTMAN: Well, if that is the next step, would you want to hear from us before the 17th on that?

THE COURT: Oh, absolutely.

Well, I'll be in touch with the Appellate -- well, I'll be in touch with the Courts informally during that week, and I'll know before I come in on the 17th what the situation is. If the Appellate Division affirms me, I would expect that -- I'll tell you what. If you'll notify Mr. Graves at the Prosecutor's Office, which you'll have to do anyway so he'll be aware of what happens, I'll get in touch with the Prosecutor's Office while I'm on vacation, find out what the situation is. If in fact there is to be -- I'll tell you what. If in fact the Appellate Division refuses to give you leave or refuses to seek, give you the relief you seek, and you're still in the case, if it is your intention to be relieved of counsel or to terminate --

Your name, sir?

MR. STROUP: I'm sorry. Mr. Stroup.

THE COURT: Mr. Stroup, that's right, you [57] were here last time, weren't you?

If for any reason that there is either going to be a motion to be relieved or a motion by your client to disassociate, that will be heard without formal notice on the 17th. The only thing I would ask you to do is before the 17th, deliver the necessary affidavits that would otherwise be in support of the notice of motion to Mr. Graves, and if a copy will be left at my secretary's desk, I'll read it before I come in on that day.

MR. COCOZIELLO: So the record is clear, I stand in the same posture as Mr. Altman, with regard to my client.

THE COURT: I understand that.

MR. COCOZIELLO: Judge, I have two --

MR. ALTMAN: Have a nice vacation, Judge, for the, except for the one day.

MR. COCOZIELLO: I have two forms of order, your Honor, if you will consider same.

MR. ALTMAN: That form of order, your Honor, is addressed to both defendants.

THE COURT: Yes, I see.

Okay, gentlemen.

MR. ALTMAN: Thank you, Judge.

[58] MR. COCOZIELLO: Shall I conform the orders?

THE COURT: Yes, could you conform them, please, just leave the necessary copies, at the end of the day I'll find out what's going on with that score.

Okay.

(Whereupon, the matter was concluded.)

SUPERIOR COURT OF NEW JERSEY
CRIMINAL DIVISION: MIDDLESEX COUNTY

Indictment No. 938-80

STATE OF NEW JERSEY,

Complainant,

vs.

DOUGLAS DAVID CHAPPEE,
GLEN STEPHEN FULLER,

Defendants.

CERTIFICATE

I, DAYE F. FENTON, a Certified Shorthand Reporter of the State of New Jersey, do hereby certify the foregoing to be a true and accurate transcript of the motion as taken stenographically by and before me at the date, time and place aforementioned.

/s/ Daye F. Fenton
DAYE F. FENTON, C.S.R.
Official Court Reporter

APPENDIX J

1:21-2. Appearances *Pro Hac Vice*

(a) Conditions for Appearance. An attorney of any other jurisdiction, of good standing there, whether practicing law in such other jurisdiction as an individual or a member or employee of a partnership or an employee of a professional corporation authorized to practice law in such other jurisdiction, or an attorney admitted in this state, of good standing, who does not maintain in this state a bona fide office for the practice of law may, at the discretion of the court in which any matter is pending, be permitted, *pro hac vice*, to speak in such matter in the same manner as an attorney of this state who is domiciled in and maintains a bona fide office for the practice of law in this state or maintains in this state the attorney's principal office for the practice of law and who is therefore, pursuant to R.1:21-1(a), authorized to practice in this state. No attorney shall be admitted under this rule without complying with R.1:20-1(b) and R.1:28-2. An application for admission *pro hac vice* shall be made on motion to all parties in the matter and shall be supported by an affidavit or certification of the attorney stating that:

(1) the attorney is a member in good standing of the bar of the highest court of the state in which the attorney is domiciled or principally practices law;

(2) the attorney is associated in the matter with New Jersey counsel of record qualified to practice pursuant to *R.*1:21-1;

(3) the client has requested to be represented by said attorney; and

(4) there is good cause for such admission, which shall include at least one of the following:

(i) the cause in which the attorney seeks admission involves a complex field of law in which the attorney is a specialist, or

(ii) there has been an attorney-client relationship with the client for an extended period of time, or

(iii) there is a lack of local counsel with adequate expertise in the field involved, or

(iv) the cause presents questions of law involving the law of the foreign jurisdiction in which the applicant is licensed, or

(v) there is need for extensive discovery or other proceedings in the foreign jurisdiction in which the applicant is licensed, or

(vi) such other reason similar to those set forth in this subsection as would present good cause for the *pro hac vice* admission.

(b) Contents of Order. The order granting admission *pro hac vice* shall require the attorney to:

(1) abide by these rules, including all disciplinary rules;

(2) consent to the appointment of the Clerk of the Supreme Court as agent upon whom service of process may be made for all actions against him or his firm that may arise out of his participation in the matter;

(3) notify the court immediately of any matter affecting his standing at the bar of any other court; and

(4) have all pleadings, briefs and other papers filed with the court signed by an attorney of record authorized to practice in this State, who shall be held responsible for them and for the conduct of the cause and of the admitted attorney therein. The order may contain further requirements concerning the participation of New Jersey counsel as the court from time to time deems necessary.

(c) Appearances in Subsequent Courts. An attorney permitted to speak *pro hac vice* by order entered by the trial court may speak in the cause on appeal by filing with the clerk of the appellate court a copy of the trial court's

order together with a certification stating that all the conditions of the order have been complied with and, to the extent applicable, will continue to be complied with in the appellate court.

(d) Revocation of Permission to Appear. The court may, on its own or a party's motion, withdraw the permission to appear granted pursuant to this rule for good cause shown. In the event of said revocation, the court shall make such further order respecting the further progress of the litigation as the circumstances may require.